VIII. Criminal Law and Procedure

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During the survey period, the area of criminal law and procedure was significantly affected by state and federal judicial decisions and by the passage of the new Indiana Penal Code.[1] The penal code, the first comprehensive revision of substantive criminal law in this state in more than seventy years,[2] is discussed in some detail in another Article in this Survey.[3] This Article will discuss the major judicial decisions and their impact on Indiana law. The discussion is presented 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.

A. Search and Seizure

During the past year the United States Supreme Court extended application of the fourth amendment in some cases, but in general the Court's decisions substantially narrowed fourth amendment protections. Several decisions this term were based upon the Court's 1973 landmark opinion in *Almeida-Sanchez v. United States*,[4] which held that a warrantless search of an automobile by a roving Border Patrol violates the fourth amendment's prohibition of unreasonable searches and seizures unless based upon probable cause.

The Supreme Court extended the rule of *Almeida* in *United*

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[1]Act of Feb. 25, 1976, Ind. Pub. L. No. 148, 1976 Ind. Acts 718. The Code as passed has numerous flaws which must be corrected by the 1977 General Assembly before it can become a useful instrument. An interim study commission has been appointed by the Governor for the purpose of correcting the more salient defects.

[2]The last such revision was the Criminal Law and Procedure Act of 1905, ch. 169, 1905 Ind. Acts 584-757.

[3]Kerr, *Foreword, supra* at 1.

[4]413 U.S. 266 (1973). *Almeida* overruled many previous lower court decisions approving routine stops and searches for illegal aliens within a reasonable distance from the United States-Mexico border. *See* United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973); United States v. Miranda, 426 F.2d 283 (9th Cir. 1970); Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1960); Kelly v. United States, 197 F.2d 162 (5th Cir. 1952).

States v. Brignoni-Ponce.[5] In *Brignoni*, a roving Border Patrol stopped an automobile and interrogated the passengers, justifying the stop by the observation that the occupants of the car appeared to be of Mexican descent. The Court held that although a roving Border Patrol stop may be justified on facts that would not constitute probable cause for an arrest, the fourth amendment requires that officers on roving patrol may stop vehicles for investigation "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion"[6] that a vehicle contains illegal aliens. The mere observation that the occupants of the car appeared to be of Mexican descent, standing alone, was not sufficient to justify such a "reasonable suspicion."

In *United States v. Ortiz*,[7] the Court applied the *Almeida* principle to vehicle searches at fixed traffic checkpoints. The Court rejected the government's argument that the circumstances of searches at fixed checkpoints are so different from those of roving patrols that a different standard should apply, noting that the search of a car in either situation involves a substantial invasion of privacy and that probable cause is an essential prerequisite to the protection of privacy from arbitrary action.

The Court made a substantial shift from this broad application of the exclusionary rule by narrowing its effect in a series of very significant decisions. In *United States v. Peltier*[8] the Court refused to apply *Almeida* retroactively to a case pending on appeal at the time of the *Almeida* decision. In reaching its decision, the Court focused on the functions of the exclusionary rule, to deter illegal governmental activity and to preserve "the imperative of judicial integrity"[9] by preventing the courts from becoming "accomplices in the willful disobedience of a Constitution they are sworn to uphold."[10] The rationale for the *Peltier* decision is that the "imperative of judicial integrity" is not offended when the Border Patrol officers who made searches and seizures prior to the *Almeida* decision were acting in good faith and in compliance with then-existing constitutional norms. Furthermore, the deterrent purpose of the court-made exclusionary rule would not be served by applying it retroactively because the law enforcement officers

[5]422 U.S. 873 (1975).

[6]*Id.* at 884-86.

[7]422 U.S. 891 (1975).

[8]422 U.S. 531 (1975). The facts in *Peltier* were strikingly similar to those in *Almeida-Sanchez*. The defendant was stopped by a roving border patrol. A search of his vehicle uncovered 270 pounds of marijuana found in the trunk.

[9]*Id.* at 536, *quoting from* Elkins v. United States, 364 U.S. 206, 222 (1960).

[10]*Id.*, *quoting from* Elkins v. United States, 364 U.S. at 223.

neither knew nor should have known that they were acting illegally. Since the then-prevailing law approved the search, the considerations of judicial integrity and deterrence of fourth amendment violations were not of sufficient weight to require the retrospective application of the rule to nullify the search. The Supreme Court affirmed this position in *Bowen v. United States*,[11] relying on *Peltier* and thus setting the stage for further criticism and limitation of the exclusionary rule.

The dissenting opinion of Justices Brennan and Marshall in *Peltier*[12] is noteworthy because it is probably prophetic. The Justices foresee gradual abandonment of the exclusionary rule for all practical purposes, and assert that emphasis is now upon the subjective knowledge and good faith of police officers rather than upon the constitutional principles articulated by the Court. Justice Brennan wrote, "If a majority of my colleagues are determined to discard the exclusionary rule in Fourth Amendment cases, they should forthrightly do so, and be done with it."[13] He decried the "slow strangulation" of the rule.[14]

During the 1975 Supreme Court term the "slow strangulation" continued. In *United States v. Martinez-Fuerte*[15] the Court held that the fourth amendment does not require Border Patrol officers operating at a fixed check point to have either a warrant or a reasonable suspicion that a vehicle contains illegal aliens before stopping the vehicle and conducting a limited interrogation, including requiring the production of papers regarding the occupants' citizenship or immigration status.[16] The decision authorizes a brief detention and a "routine and limited" inquiry into residence status based upon nothing more than unsupported, subjective suspicion. For this purpose, apparent Mexican ancestry is sufficient.[17]

In summary, the status of Border Patrol stops and searches now seems to be as follows: roving patrols must have reasonable

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[11]422 U.S. 916 (1975).

[12]422 U.S. 544 (1975) (Brennan and Marshall, JJ., dissenting).

[13]*Id.* at 561.

[14]*Id.* at 561-62.

[15]96 S. Ct. 3074 (1976).

[16]*Id.* at 3086. The Court noted that such stops entail minimal interference with legitimate traffic and, furthermore, that such checkpoint stops involve little discretionary enforcement activity. *Id.* at 3083.

[17]Justice Brennan, again dissenting, condemned the continuing evisceration of the fourth amendment's protections. He stated,

> [T]o permit, as the Court does today, police discretion to supplant the objectivity of reason and, thereby, expediency to reign in the place of order, is to undermine Fourth Amendment safeguards and threaten erosion of the cornerstone of our system of a government . . . .

Id. at 3092 (Brennan, J., dissenting).

suspicion, based upon something more than apparent Mexican ancestry of the occupants of a car, in order to stop a vehicle, and must have probable cause to conduct a search.[18] However, officers at a fixed traffic checkpoint may stop a vehicle and interrogate the occupants for any reason, including the mere presence of persons of apparent Mexican descent,[19] but they must have probable cause to conduct a search.[20]

The Supreme Court continued to narrow the fourth amendment's protection in eight additional cases. In *Texas v. White*[21] the Court upheld a warrantless search of an automobile in police custody despite the fact that the defendant, who had been arrested for a felony, refused to give his consent to the search. In *United States v. Watson*[22] the Court permitted a warrantless arrest in a public place based upon probable cause that the defendant had previously committed a felony. In *United States v. Santana*,[23] noting that the defendant was not in an area where she had any expectation of privacy, the Court permitted a warrantless arrest for a felony on the defendant's porch. In *United States v. Miller*[24] the Court upheld the validity of a subpoena duces tecum requiring presentation of checks, deposit slips, and other records pertaining to an individual's bank account in the custody of the bank.

In an opinion which could have very significant impact, the Supreme Court in *Stone v. Powell*[25] refused to allow collateral review through federal habeas corpus proceedings of alleged fourth amendment violations if there has been "full and fair litigation" of the issues in state court.[26] Even if a search and seizure violation does in fact exist, the accused's remedy is through direct appeal only. The decision distinguished, or reinterpreted, the Court's land-

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[18]United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[19]United States v. Martinez-Fuerte, 96 S. Ct. 3074 (1976).

[20]United States v. Ortiz, 422 U.S. 891 (1975).

[21]423 U.S. 67 (1975).

[22]423 U.S. 411 (1976).

[23]96 S. Ct. 2406 (1976). The court left unanswered the question of whether a warrant is required for an arrest within the defendant's home. *Id.* at 2411 (Marshall, J., dissenting).

[24]425 U.S. 435 (1976). The court held that the defendant did not have standing to object to the seizure because he could not claim ownership or possession of the papers, since they were business records of the bank. *Id.* at 440-42. *But cf.* Jones v. United States, 362 U.S. 257 (1960). Furthermore, the defendant in *Miller* did not have a valid expectation of privacy because the items in controversy were not confidential. 425 U.S. at 442-43.

[25]96 S. Ct. 3037 (1976).

[26]Justice Powell, writing for the majority in *Stone*, first expressed this view in his opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

mark decision in *Mapp v. Ohio*[27] on the ground that *Mapp* was decided on direct review. Although *Mapp* flatly prohibited admission of illegally obtained evidence in state trials, *Stone* in effect holds that this is only a conditional prohibition, depending upon how and in what forum the issue is raised. The majority opinion criticized the deterrent theory which has been the primary justification for the exclusionary rule, noting that there is no empirical evidence that it works, and decided that if the theory has any validity at all, it is at the trial and direct appeal levels only. The Court noted further that the exclusionary rule excludes only real evidence, protecting the guilty, and stated that this result is too costly to a "rational system of criminal justice."[28]

The majority of the Court clearly does not favor the exclusionary rule but seems to fear its total and final abolition, and so continues to chip away at its effectiveness. Continuing the trend, the Court held in *United States v. Janis*[29] that evidence seized by a state officer in violation of the fourth amendment is admissible in a civil proceeding by or against the United States. In *South Dakota v. Opperman*[30] the Court approved routine inventory searches without a warrant of any vehicle towed in for a parking violation. And, finally, in *Andresen v. Maryland*[31] a series of search warrants designating items to be seized and including the phrase "together with other fruits, instrumentalities and evidence of crime at this time unknown"[32] were held to be valid against a claim that they were general warrants. The Court noted that the quoted phrase is always construed as part of a longer sentence pertaining to the specific crime under investigation, and therefore each warrant authorized search and seizure only of evidence relevant to the specific crime. The defendant also contended that the admission into evidence of several files from his law office, seized pursuant to the warrants and containing evidence of the commission of other crimes, was contrary to the Court's holding in *Warden v. Hayden*.[33] The Court distinguished *Warden*, which held that "mere evidence" may be seized only where there is probable cause to believe that the evidence sought would aid in apprehen-

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[27]367 U.S. 643 (1961). *Mapp* held that the exclusionary rule is applicable to the states by means of the due process clause of the fourteenth amendment.

[28]96 S. Ct. at 3050-52. The Court applied a balancing test, weighing the utility of the exclusionary rule against the costs of extending it to collateral review of fourth amendment claims. *Id.* at 3049.

[29]96 S. Ct. 3021 (1976).

[30]96 S. Ct. 3092 (1976).

[31]96 S. Ct. 2737 (1976), also discussed at text accompanying notes 59-61 *infra*.

[32]*Id.* at 2748.

[33]387 U.S. 294 (1967).

sion or conviction for a specified crime, and held that the *Andresen* files disclosed evidence of other crimes which was admissible to show the defendant's general intent and common scheme of fraudulent conduct.

Two recent Indiana cases are worthy of note on the subject of the fourth amendment. In *Stokes v. State*[34] a referee of a city court, who had no authority to make binding orders or decrees in his own right,[35] approved issuance of a search warrant.[36] The Third District Court of Appeals held the warrant invalid because a referee is not one of the judicial officers authorized in Indiana Code section 35-1-6-1(a) to issue search warrants.[37] The court noted that if a written appointment of the referee as judge pro tempore had been entered of record, the warrant would have been valid. This decision is clearly contrary to the spirit of the United States Supreme Court's holding in *United States v. Peltier*.[38] In *Stokes*, although the officers acted in the good faith belief that their actions were lawful and the referee believed that his action was proper, an otherwise valid warrant was struck down because of an unknown defect.

In *Wilson v. State*[39] a shotgun and shells were seized pursuant to a search warrant issued on the basis of an affidavit alleging information seven days old. The Indiana Supreme Court rejected Wilson's contention that the warrant was stale under the principles set forth in *Ashley v. State*.[40] The court distinguished *Ashley*, which involved marijuana, a fungible good less likely to remain intact over a period of time, from *Wilson*, involving a hard good unlikely to change character with the passage of time.

B. Confessions and Admissions

1. Voluntariness

In *Magley v. State*,[41] the Indiana Supreme Court relied on *Burton v. State*[42] to hold that if the voluntary character of a con-

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[34]343 N.E.2d 788 (Ind. Ct. App. 1976).

[35]IND. CODE §§ 33-13-10-2, 35-1-6-1(a) (Burns 1975).

[36]The referee was allegedly sitting as judge pro tempore of the Gary City Court on the day in question. However, there was no evidence of any written document certifying his appointment as required by law. IND. R. TR. P. 63(E).

[37]"Justices of the peace, judge of any city court, town court or magistrates court or the judge of any court of record, may issue warrants upon probable cause . . . ." IND. CODE § 35-1-6-1(a) (Burns 1975).

[38]422 U.S. 531 (1975), discussed at text accompanying notes 8-14 *supra*.

[39]333 N.E.2d 755 (Ind. 1975).

[40]251 Ind. 359, 241 N.E.2d 264 (1968).

[41]335 N.E.2d 811 (Ind. 1975).

[42]260 Ind. 94, 292 N.E.2d 790 (1973).

fession is challenged the state must prove voluntariness beyond a reasonable doubt.[43] Thus, the Indiana standard is higher than that established by the United States Supreme Court in *Lego v. Twomey*,[44] requiring only a preponderance of the evidence.[45]

In *Magley* the court also set forth for the first time the specific procedure for testing voluntariness of a confession, calling for a pretrial hearing to determine as a matter of law whether a confession was voluntary. The court further suggested that when a defendant makes an objection at trial to preserve the record, the court should consider this pretrial determination res judicata and overrule the objection, thus avoiding a duplicate hearing at trial on the same issue. However, if the defendant alleges he has new evidence to present on the subject he must summarize it for the trial court, which may then summarily overrule the objection if the new evidence is found insufficient to change the result of the pretrial decision. If, from the summary, the court determines that the new matter casts a "reasonable doubt" on the pretrial ruling, the court should hold another hearing outside the presence of the jury. Relitigation of the motion to suppress may be more appropriate when the trial judge did not conduct the pretrial hearing, is unfamiliar with the evidence presented at the earlier hearing, and is therefore less able to weigh the new and old evidence as a whole.

2. *Miranda Rights*

The United States Supreme Court is continuing perceptibly to

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[43]335 N.E.2d at 817. The appropriate test to be applied is "whether, looking at all the circumstances, the confession was free and voluntary, and not induced by any violence, threats, promises, or other improper influence." *Id.*, *quoting from* Nacoff v. State, 256 Ind. 97, 267 N.E.2d 165 (1971).

The *Magley* decision is clearly in conflict with a distinct line of Third District Court of Appeals cases following Lego v. Twomey, 404 U.S. 477 (1972), and holding that the state has the burden of proving the voluntariness of the confession by a preponderance of the evidence. *See* Moreno v. State, 336 N.E.2d 675 (Ind. Ct. App. 1975); State v. Cooley, 319 N.E.2d 868 (Ind. Ct. App. 1974); Ramirez v. State, 153 Ind. App. 142, 286 N.E.2d 219 (1972). A careful reading of *Magley* suggests that the supreme court meant to resolve this dispute in favor of the reasonable doubt standard. The court noted parenthetically that the preponderance of the evidence test is applicable in the federal courts, 335 N.E.2d at 817, thus distinguishing the Indiana practice. Hopefully, subsequent opinions by both the Indiana Supreme Court and the Indiana Court of Appeals will clarify this apparent inconsistency. For further discussion on this point, see Kerr, *Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 171-72 (1975) [hereinafter cited as Kerr, *1975 Survey*].

[44]404 U.S. 477 (1972).

[45]*Magley* was reaffirmed in Lindsey v. State, 341 N.E.2d 505 (Ind. 1976).

narrow the application of *Miranda v. Arizona*.[46] According to dissenting Justices Brennan and Marshall in *Michigan v. Mosley*,[47] the Supreme Court is rapidly eroding the constitutional protections established in *Miranda* and the present trend portends the ultimate demise of many fifth amendment rights.[48] In *Mosley* the defendant was arrested for robbery and was advised of his *Miranda* rights. When he refused to discuss the robbery, the questioning stopped. He contended that this refusal precluded the police from any further attempt to question him about any criminal activity. However, subsequently the defendant was again advised of his rights and questioned about a different crime, to which he confessed. The Court held that the second interrogation about a different crime, preceded by full warning and waiver, was proper.[49] The *Mosley* decision leaves unchanged the prohibition of repeated attempts to question the accused about the same crime once he has invoked his right to remain silent.[50]

Another recent Supreme Court decision, *Beckwith v. United States*,[51] held *Miranda* inapplicable to a defendant who was interrogated in his own home by IRS agents who failed to give him the full *Miranda* warnings. He was not in custody, but the focus of suspicion was clearly on him when he made certain inculpatory admissions which were later introduced at trial. On appeal the defendant claimed that the "psychological restraints" imposed on one who is the focus of a criminal investigation "are the functional, and therefore, the legal equivalent of custody."[52] Although the Court agreed that there may be noncustodial circumstances so coercive as to require *Miranda* warnings, the factual context of *Beckwith* could not support the requirement.

The Supreme Court rejected the defendants' claim of fifth amendment privilege against self-incrimination in *Garner v. United*

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[46]384 U.S. 436 (1966).

[47]423 U.S. 96 (1975).

[48]*Id.* at 112 (Brennan, J., dissenting).

[49]When a confession made after a person in custody has decided to remain silent is challenged, its admissibility depends on whether his "right to cut off questioning was scrupulously honored." *Id.* at 104. The Court noted that in this case Mosley's desire to remain silent was honored. Questioning was resumed only after the passage of a significant period of time and after a new set of warnings, and the second interrogation was limited to questions concerning a crime not discussed in the prior interrogration.

[50]*See* Miranda v. Arizona, 384 U.S. 436, 473-74 (1966).

[51]425 U.S. 341 (1976).

[52]*Id.* at 344-45. The Court noted that *Miranda* and the many subsequent decisions interpreting that opinion have stressed the significance of the custodial nature of the interrogation as a factor requiring specific warnings. The elements which led the *Miranda* Court to its decision are simply not present in noncustodial, informal interrogations such as the one in *Beckwith*.

States[53] and *United States v. Fisher*.[54] In *Garner*, a nontax criminal prosecution, the government introduced at trial the defendant's income tax returns disclosing his occupation as a professional gambler and his association with certain co-conspirators. The defendant claimed this evidence constituted compulsory self-incrimination because the law required him to file the returns. The Court acknowledged that the fifth amendment privilege is applicable to compelled disclosures on tax returns, but held that the defendant's failure to assert the privilege on the tax return constituted a waiver of the privilege.[55]

In *Fisher* the defendants[56] were attorneys of taxpayers under investigation for violation of federal tax laws. The taxpayers had transferred certain documents relating to their accountants' preparation of tax returns to the attorneys. The IRS served subpoenas duces tecum on the attorneys, and the question raised in each case was whether the subpoenas should be enforced. Both defendants claimed that enforcement would be in violation of the fifth amendment rights of their clients and of the attorney-client privilege. The Court ruled that the fifth amendment did not proscribe the compelled production of incriminating evidence in the case at bar, but applies only when the accused is compelled to make a testimonial communication incriminating himself.[57] The accountants'

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[53]424 U.S. 648 (1976).

[54]425 U.S. 391 (1976).

[55]424 U.S. at 657-58. The Court noted that the *Miranda* rule requiring exclusion of incriminating statements in the absence of a knowing and voluntary waiver of the privilege does not apply in the *Garner* situation, since the rule was adopted to prevent the undue influence inherent in custodial interrogation. *Id.* at 657. This justification does not apply to the case of a taxpayer, who may prepare his return at his leisure with the advice of counsel and without the psychological pressures present in custodial interrogations.

The Court distinguished the cases of Marchetti v. United States, 390 U.S. 39 (1968), and Grosso v. United States, 390 U.S. 62 (1968), which involved criminal prosecutions for failure to file the returns required of gamblers in connection with federal occupational and excise taxes on gambling. In these cases, the United States Supreme Court held that fifth amendment privilege was a defense to the charge of failure to file a return, since disclosures made in connection with payment of the taxes would tend to be incriminating in view of pervasive criminal regulation of gambling activities. 390 U.S. at 48-49; 390 U.S. at 66-67. The *Garner* Court noted that the petitioner was in a different situation, since federal income tax returns are not directed at persons "inherently suspect of criminal activities," 390 U.S. at 39, and therefore do not involve a compulsion to incriminate. 424 U.S. at 657-58.

[56]*Fisher* was a consolidation of United States v. Fisher, 500 F.2d 683 (3d Cir. 1974) and United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974).

[57]425 U.S. at 396-97. The Court also held that an attorney as an agent of his client may not raise the client's privilege, stating that the privilege "was never intended to permit [a person] to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of

work papers, although incriminating, do not rise to the level of testimonial communication within the protection of the fifth amendment.[58] The Court also found that the attorney-client privilege did not apply, since transferring papers to an attorney invests the documents with no greater protection than if possessed by the taxpayer or someone else.

Finally, in *Andresen v. Maryland*[59] incriminating files were seized pursuant to a valid search warrant from the office of a lawyer who was a suspect in a fraud action, and the defendant claimed that admission of the documents at trial violated his fifth amendment rights. The Court rejected this claim and held that the search of an individual's office for business records, their seizure, and subsequent introduction into evidence do not offend the fifth amendment. Statements to the contrary in previous cases, *Boyd v. United States*[60] and *Hale v. Henkle*,[61] were deemed no longer tenable.

In the case of *Brown v. Illinois*,[62] the Supreme Court, applying fourth amendment principles, struck down a confession which followed complete *Miranda* warnings and waiver. The defendant was arrested without warrant or probable cause in violation of the fourth amendment, and while in illegal custody he was given warnings preceding his confession. The Illinois Supreme Court held that the *Miranda* warnings broke the causal connection between the illegal arrest and the confession and that the confession, given after proper warnings, was purged of the primary taint of the unlawful arrest.[63] The United States Supreme Court disagreed and, holding that *Miranda* warnings by themselves do not attenuate the taint of an unconstitutional arrest, applied the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*[64] and excluded the confession.

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such person . . . the amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*." *Id.* at 398, *quoting from* Couch v. United States, 409 U.S. 322, 328 (1973) (emphasis in original).

[58] *Id.* at 408-14. It is interesting to note that the Supreme Court in Garner v. United States, 424 U.S. 648 (1976), discussed at text accompanying notes 53-55 *supra*, found that the preparation and filing of an income tax return constituted testimony within the meaning of the fifth amendment. "The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a 'witness,' as the term is used herein." *Id.* at 656.

[59] 96 S. Ct. 2737 (1976), discussed at text accompanying notes 31-33 *supra*.

[60] 116 U.S. 616 (1886).

[61] 201 U.S. 43 (1906).

[62] 422 U.S. 590 (1975).

[63] People v. Brown, 56 Ill. 2d 312, 304 N.E.2d 356 (1974).

[64] 371 U.S. 471 (1963). Under *Wong Sun*, the appropriate point of inquiry in such cases is "whether, granting establishment of the primary illegality,

The Court did acknowledge, however, that there may be circumstances in which a confession following an illegal arrest could be admissible if it was a product of free will and not directly connected to the arrest. Relying on this language from *Brown*, the Indiana Supreme Court in *Montes v. State*[65] upheld a confession in a similar factual situation. After a murder was committed in a work release center, all of the residents were taken to police headquarters and questioned without warrant or probable cause as to any individual. All residents were given *Miranda* warnings and two confessed. The court held that the confessions were freely and knowingly given under the circumstances, and therefore were "purged of the primary taint"[66] of the defendants' illegal detention at the police station. It should be noted that the defendants were inmates of the work release center and in the custody of the Department of Correction at the time of the interrogation, and the result may have depended on that fact.[67]

In *Pulliam v. State*,[68] the Indiana Supreme Court addressed the question of when during custody the accused's *Miranda* rights attach. The defendant was convicted of armed robbery after a trial in which the court admitted his statement of his age made to the police officer who took routine booking information. Age was a material element of the crime[69] and the statement was admitted

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the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 487-88 (citations omitted). *Miranda* warnings in and of themselves are not sufficient to break the causal connection between an illegal arrest and a confession for fourth amendment purposes. Brown v. Illinois, 422 U.S. at 602. The Court observed that "if *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the fourth amendment violation, the effect of the exclusionary rule would be substantially diluted." *Id.*

[65]332 N.E.2d 786 (Ind. 1975).

[66]*Id.* at 791.

[67]The appellants were well acquainted with the atmosphere of the jail and knew that their status as inmates would remain unchanged whether or not they made a statement. Thus, the danger of coercion arising out of the custodial situation was not a significant factor in *Montes*. Moreover, no threats were made and there was no evidence that the interrogation was conducted in a manner likely to arouse fear. 332 N.E.2d at 793.

[68]345 N.E.2d 229 (Ind. 1976), also discussed at text accompanying note 141 *supra*.

[69]IND. CODE § 35-12-1-1 (Burns 1975) (repealed effective July 1, 1977, Act of Feb. 25, 1976, Pub. L. No. 148, § 24, 1976 Ind. Acts 815) provides:

> Any person who being over sixteen [16] years of age, commits or attempts to commit any felony, while armed with any dangerous or deadly weapon, or while any other person is present and aiding or assisting in committing or attempting to commit such felony, is armed with any dangerous or deadly weapon, shall be guilty of a separate felony . . . .

over the objection that the defendant had not first been advised of his *Miranda* rights. The court found that the *Miranda* rule is concerned with protecting a suspect against interrogation of an investigative nature, and that questions relating to routine information necessary for the booking process do not require warnings and waiver. The statement was therefore held admissible.

In *McFarland v. State*[70] the defendant made incriminating statements to a non-police, prosecution witness after he was arrested and in custody, but before he had been given his *Miranda* warnings. The Indiana Supreme Court held that *Miranda* applies to custodial interrogation by law enforcement officers, but not to statements made to private persons, even though made while in police custody.[71]

The supreme court issued an opinion regarding confessions by juveniles in the case of *Hall v. State,*[72] in which the seventeen-year-old defendant was arrested for rape and kidnapping. Before questioning by police, the defendant was confronted by the victim at the police station and confessed to the rape. Later his guardian arrived, *Miranda* warnings were given to both, and the defendant also confessed to a murder. The defendant was convicted of both crimes, but the primary issue on his appeal was the confession to murder. The court criticized the waiver as being improper before the defendant and his guardian had a "meaningful opportunity" to counsel together, held that police pressure had been applied by permitting the first confrontation before the guardian arrived, and excluded the confession to the murder. The court set forth the following guidelines to be observed when obtaining confessions from juveniles: (1) Both the juvenile and his parent or guardian must be advised of his *Miranda* rights; (2) the juvenile must be given the opportunity to consult with his parents, guardian, or attorney regarding the waiver of those rights. This opportunity for consultation must not be a formality, but must have substance,

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[70]336 N.E.2d 824 (Ind. 1975).

[71]*Cf.* Lukas v. State, 330 N.E.2d 767 (Ind. Ct. App. 1975), in which the court held inadmissible a tacit admission made to his stepson while the defendant was incarcerated in Marion County Jail prior to trial. When one is in police custody, one need not deny all accusations when failure to do so would constitute an admission. For a tacit or adoptive admission to be admissible, the prosecution must show that "the charge was heard and understood and that the prevailing circumstances are such that the accused would naturally be expected to deny the charge." *Id.* at 770. The court did not discuss the effect of the *Miranda* rule on the admissibility of such admissions.

For further discussion of *Lukas*, see Marple, *Evidence, infra* at 235. For discussion of cases involving tacit or adoptive admissions, see Kerr, *1975 Survey, supra* note 43, at 173-74.

[72]346 N.E.2d 584 (Ind. 1976).

which requires meaningful opportunity for the juvenile and his guardian to discuss alternatives. It should be noted that the guardian in *Hall* was not a legal guardian, but merely the defendant's sister, the only available relative. The court, citing *Lewis v. State*,[73] found that the term "guardian" under these circumstances is not limited to a person appointed in a legal proceeding, but includes a "'de facto guardian' who establishes his status by acting in loco parentis."[74] Therefore, if the sister had been given a meaningful opportunity to consult with her brother before the first confrontation, the confession would have been valid.

C. *Discovery*

Since the Indiana Supreme Court's landmark decision in *State ex rel. Keller v. Criminal Court*[75] there have been several decisions on criminal discovery, but none specifically expanding, restricting, or clarifying *Keller*.[76] From the general tenor of the issues raised on appeal, it appears that few trial courts have been utilizing their broad discretionary power to order full pretrial discovery. Some trial courts still permit the first discovery of grand jury testimony or witness statements only at trial after a proper foundation has been laid pursuant to the guidelines set forth in *Antrobus v. State*.[77] In two cases decided during the survey period, *Morris v. State* [78] and *Layne v. State*,[79] the Indiana Supreme Court and the First District Court of Appeals affirmed the trial courts' denial of pretrial discovery of witness statements, both citing *Antrobus* as authority

[73]259 Ind. 431, 288 N.E.2d 138 (1972).

[74]346 N.E.2d at 584.

[75]317 N.E.2d 433 (Ind. 1974). *Keller* held that the state must disclose to the defense, before trial, the identity and statements of prospective prosecution witnesses. For further discussion of the *Keller* opinion, see Kerr, *1975 Survey*, *supra* note 43, at 178-79; Note, *Keller, Prosecutional Discovery and the Privilege Against Self-Incrimination*, 9 IND. L. REV. 623 (1976).

[76]Only three decisions during the past year have cited the *Keller* opinion. None of these cases dealt with *Keller* in any depth; it was generally cited for the proposition that the trial court has broad discretion and flexibility in the area of criminal discovery. *See* Owens v. State, 333 N.E.2d 745 (Ind. 1975); Keel v. State, 333 N.E.2d 328 (Ind. Ct. App. 1975); Collins v. State, 321 N.E.2d 868 (Ind. Ct. App. 1975).

[77]253 Ind. 420, 254 N.E.2d 873 (1970). Under the rule set forth in *Antrobus*, an adequate foundation is laid when: "(1) The witness whose statement is sought has testified on direct examination; (2) A substantially verbatim transcription of statements made by the witness prior to trial is shown to probably be within the control of the prosecution; and, (3) The statements relate to matters covered in the witness' testimony in the present case." *Id.* at 427, 254 N.E.2d at 876-77.

[78]332 N.E.2d 90 (Ind. 1975), also discussed at text accompanying notes 171-75, 198 *infra*.

[79]329 N.E.2d 619 (Ind. Ct. App. 1975).

and neither discussing the application of *Keller*. *Morris* is interesting because the opinion states that the defendant has a "right" to statements "only *after* the witness has testified on direct examination"[80] and has no right to a transcript of the grand jury proceedings. Since the *Keller* decision discussed "rights" to discovery, the obvious problem is to harmonize *Morris* and *Layne* with *Keller*. The logical and reasonable explanation would be that since the trial court rulings in these cases were made before the *Keller* decision was issued, the higher courts may merely be refusing to give *Keller* retroactive application. On the other hand, it could also be argued that the *Morris* case gives the trial court discretion to decide whether to follow *Keller* and that there would be no error in applying the standards of either *Antrobus* or *Keller*. In other words, arguably *Keller* confers no "rights" to pretrial discovery on either the prosecution or the defense, but gives the trial court discretion to permit discovery, and prescribes the outer limits of a permissible discovery order. This, however, would appear to be the least likely construction in view of the specific language of *Keller*. It is hoped that the Indiana Supreme Court will specifically adopt the first position in future decisions, reaffirming the view that both sides have a right to discovery under *Keller* but giving the right only prospective application.

Probably the most troublesome question raised by the *Keller* decision is the court's use of the term "reciprocal" in relation to discovery rights. Because of the use of this term, some believe that the State's right to discovery must await the defendant's request. This view probably is not correct for several reasons. First, the trial court's order to the parties in *Keller* was clear and unequivocal, explicitly stating that each side had a mutually independent right to discovery. This order was affirmed by the supreme court. Secondly, the term "reciprocal" is defined by a dictionary as something interchanged, and given mutually, or performed by both sides.[81] Therefore, the right to discovery may be reciprocal in nature and still be exercised independently in practice. Thirdly, holding that the prosecutor's right to discovery depends upon the defendant's prior exercise of his right would indicate a return to the sporting theory of justice, a theory completely contrary to the spirit and purpose of open discovery. It would be unfair to the accused because he would be put in the position of having to decide whether to give up his own right to discovery for reasons of strat-

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[80] *Id.* at 93 (emphasis in the original).

[81] "Mutual; done by each to the other; due from each other." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 1417 (11th ed. 1952).

egy. If he elected to give up his rights, there would be no discovery for anyone and the result would be a return to trial by ambush.

On the other hand, if both sides were given independent rights in all cases, information might be exchanged as a matter of course, permitting both sides to deal intelligently with the strengths and weaknesses of their cases and, hopefully, enabling them to negotiate a quality plea agreement or dismissal when appropriate. This salutary result is possible only if discovery rights are unconditional and independent.

The future of criminal discovery is bright. Slowly and gradually, but ultimately, the principals in criminal trials will accept the necessity for quality justice under the law. They will learn that there is still room for good advocacy within the ambit of full disclosure. The credibility or accuracy of the witnesses' testimony is always subject to question, but when each side knows before trial the identity of those witnesses a better determination of their truthfulness and accuracy can be made. The State should reveal its evidence before trial, as should the defense. The defense should vigorously compel the State to prove its case; but not by the use of tricks, games, or "torpedo" strategy. A defendant should not be permitted to await the close of the State's case before deciding upon his defense strategy. He has long been required to advise the prosecutor of an alibi defense[82] before trial in order to prevent surprise at trial, and this same logic should apply to any other defense.

The *Keller* decision may have eliminated the need to file a notice of alibi, because if full disclosure is ordered and the prosecutor fails to request discovery, he has waived his right of notice. The burden is on each side to exercise its right and failure to do so would constitute a waiver. This position finds support in a recent decision by the Second District Court of Appeals, *Buchanan v. State.*[83] Relying on the Indiana Supreme Court's decision in *Dillard v. State,*[84] the court held that by failing to seek compliance with a discovery order the defendant waived his right to full discovery.[85]

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[82]IND. CODE § 35-5-1-1 (Burns 1975), provides:

> Whenever a defendant in a criminal case in a court other than that of a justice of the peace shall propose to offer in his defense evidence of alibi, the defendant shall, not less than ten [10] days before the trial of such cause, file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to offer such defense.

The United States Supreme Court affirmed the constitutionality of a similar statute in Williams v. Florida, 399 U.S. 78 (1970).

[83]336 N.E.2d 654 (Ind. Ct. App. 1975).

[84]257 Ind. 282, 274 N.E.2d 387 (1971).

[85]336 N.E.2d at 657.

The court noted that a request for a continuance is the appropriate remedy in such cases.[86]

Granting a continuance to the defense in such cases is not always necessary, however. In *Bradberry v. State,*[87] on the morning of trial the prosecutor disclosed the names of two witnesses omitted from the witness list, and the defense moved for a continuance. The trial court denied the continuance, but imposed the following conditions before allowing the witnesses to testify: (1) The state was to furnish to the defense copies of the witnesses' statements containing the substance of their testimony; (2) the defense was permitted to personally interview the witnesses; (3) after reading the statements and conducting the interview the defense could renew its request for a continuance if it found good and substantial reasons to do so. The Second District Court of Appeals held this procedure to be proper and, in the absence of a showing of harm to the defendant, within the discretion of the trial court.

D. Jurisdiction—Juvenile Waiver

Waivers of juveniles to courts of criminal jurisdiction continue to come under procedural attack. It is becoming clear that the waiver hearing must be held in the court of juvenile jurisdiction and must in fact be a hearing rather than a perfunctory exercise; that the waiver order must clearly state the reasons for the order based on the facts of each individual case rather than a mere recital on a preprinted form; and that each procedural step must be in sequence and depend upon the proper completion of the step before it.[88] The most recent case on the subject, decided by the Second District Court of Appeals, is *Duvall v. State.*[89] The court held that neither the defendant, his parents, nor his attorney can waive the hearing and request that the case be bound to criminal court. Even if no one concerned wants the hearing, it must still be held. Failure to hold the hearing will result in reversal of the criminal court conviction, and not merely a remand for proper waiver proceedings.

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[86]*Id.* at 656.

[87]328 N.E.2d 472 (Ind. Ct. App. 1975).

[88]Atkins v. State, 259 Ind. 596, 290 N.E.2d 441 (1972); Cartwright v. State, 344 N.E.2d 83 (Ind. Ct. App. 1976); Seay v. State, 337 N.E.2d 489 (Ind. Ct. App. 1975).

[89]353 N.E.2d 478 (Ind. Ct. App. 1976).

E. Pretrial Proceedings

1. Grand Jury

Since the United States Supreme Court's decision in *Taylor v. Louisiana*[90] held unconstitutional a Louisiana statute which excluded women as a class from jury duty, there have been various reactions and overreactions on the part of the states. Jury commissioners have routinely been criticized for excluding from call all persons who could claim exemptions. The Indiana Supreme Court in *Baum v. State*[91] specifically approved the practice of excluding persons over sixty-five in the grand jury selection process, noting that the exclusion of a particular group is permissible if there is "some logical reason for such exclusion."[92] Presumably, the statutory exemption from jury duty of persons over age sixty-five[93] provides a "logical reason" for exclusion, and this rationale may also apply to other groups exempted from jury duty by statute.[94]

During the past year, both the United States Supreme Court and the Indiana Supreme Court decided cases involving the nature and extent of grand jury investigations and the rights of those subpoenaed to appear before the grand jury. In the Indiana case of *State ex rel. Pollard v. Criminal Court*,[95] the supreme court affirmed a trial court order requiring production of financial records before the grand jury, holding that a subpoena duces tecum may be issued to a prospective grand jury witness and that the fourth amendment prohibition against unreasonable searches and seizures does not apply to such subpoenas. However, the subpoenas may not be issued arbitrarily or in excess of statutory authority, and they must be reasonable in nature. Perhaps of more significance for the present discussion is the fact that the court recognized that the fifth amendment privilege against self-incrimination applies to grand jury proceedings and set forth guidelines enabling a witness to assert that privilege. Pursuant to these guidelines all

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[90]419 U.S. 522 (1975).

[91]345 N.E.2d 831 (Ind. 1976), also discussed at text accompanying notes 124-25 *infra*.

[92]*Id.* at 833.

[93]IND. CODE § 33-4-5-7 (Burns 1975) provides, in pertinent part: "Any person shall be excused from acting as a juror who is over sixty-five [65] years of age and desires to be excused for such reason."

[94]The following persons are exempted from jury service by IND. CODE § 33-4-5.5-13 (Burns 1975):

> [M]embers in active service of the armed force of the United States, elected or appointed officials of the executive, legislative or judicial branches of government of the United States, state of Indiana, or counties affected by this chapter [33-4-5.5-1—33-4-5.5-22] who are actively engaged in the performance of their official duties.

[95]329 N.E.2d 573 (Ind. 1975).

witnesses before the grand jury must be fully advised of their rights protected by the privilege. A witness summoned to testify before the grand jury must be advised of the general nature of the grand jury investigation. This information, which must be contained in the subpoena,[96] enables a witness who is charged with a criminal offense or who is the subject of the investigation to consult with counsel in order to determine whether or not he should testify.[97] Furthermore, the subpoena must inform the witness of his right to counsel, either retained or appointed. Finally, a witness who is neither charged with a criminal offense nor the subject of the investigation may not assert fifth amendment rights upon his arrival at the grand jury room; rather, he may assert his claim only upon being asked a question which he believes may incriminate him, and the propriety of the claim is to be determined by an *in camera* hearing before the court which convened the grand jury.[98]

In contrast, the United States Supreme Court in *United States v. Mandujano*[99] considering a perjury prosecution based on testimony before the federal grand jury, held that *Miranda* warnings need not be given to grand jury witnesses even when the witness is a "putative" or "virtual" defendant. The Court applied the traditional interpretation of the *Miranda* decision, limiting its application to custodial interrogations, and noted that extending *Miranda* to grand jury investigations would thwart the work of the grand jury. *Miranda* warnings invoke a right to remain silent, and that right does not exist before the grand jury, where witnesses must answer all questions not subject to a valid claim under the fifth amendment. Furthermore, *Miranda*'s reference to the sixth amendment right to counsel does not apply in grand jury proceedings, when adversary criminal proceedings have not yet been initiated.[100]

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[96] *Id.* at 589.

[97] An accused who refuses to comply with either a subpoena duces tecum or a subpoena ad testificandum may not be held in contempt. *Id.* at 590.

[98] *Id.* at 590-91. *See* Kerr, *1975 Survey*, *supra* note 43, at 175-76.

[99] 96 S. Ct. 1768 (1976).

[100] *Id.* at 1779. However, a witness before the grand jury may consult with counsel *outside* the grand jury room. Apparently an indigent witness would not have this opportunity, since the sixth amendment does not apply. *See* Kirby v. Illinois, 406 U.S. 682 (1972).

Justices Brennan and Marshall, in their concurring opinion, stated that the plurality opinion "suggests a denigration of the privilege against self-incrimination and the right to the assistance of counsel." 96 S. Ct. at 1781. Observing that grand jury proceedings are subject to fundamental guarantees of liberty, including the fifth amendment privilege against self-incrimination, they held that an individual's only protection before a grand jury is the exercise of this privilege, which cannot be exercised unless the individual is aware of his right. Finally, the concurring justices noted that "ours is an

In summary, both *Pollard* and *Mandujano* recognize the applicability of the fifth amendment privilege against self-incrimination in grand jury proceedings. The Indiana decision requires that the witness be given certain warnings; the United States Supreme Court does not. *Pollard* makes it clear that a witness has a right to counsel but it is not clear at what point this right comes into existence. The witness may consult with his attorney prior to testifying, but the court did not decide whether the witness may seek the advice of counsel during the course of his testimony. *Mandujano* limits consultation to discussions outside the grand jury room and further limits this opportunity to those with the financial resources to hire private counsel.

2. Right to Counsel and Probable Cause

Since the Supreme Court's decisions in *Gideon v. Wainwright*[101] and *Argersinger v. Hamlin*[102] establishing the constitutional right to counsel in any case in which the accused may be deprived of liberty, many defendants have attempted to assert that right at probable cause hearings and have also claimed that a probable cause hearing must be adversary in nature. Relying on the Supreme Court's decision in *Gerstein v. Pugh*,[103] the Third District Court of Appeals in *Tinsley v. State*[104] summarily rejected a similar contention, holding that a defendant has neither a constitutional right to an adversary probable cause hearing nor a right to be represented by counsel in such proceedings.[105]

3. Bail

In a decision which could have a great impact on bail bond practice in this state, the First District Court of Appeals in *Board of County Commissioners v. Farris*[106] approved a new bail system instituted in Vanderburgh County. The bail schedule and court rules offer the defendant, in addition to the usual forms of bail,

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accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Id.* at 1782, *quoting from* Rogers v. Richmond, 365 U.S. 534, 541 (1961) (Brennan and Marshall, JJ., concurring).

[101]372 U.S. 335 (1963).

[102]407 U.S. 25 (1972).

[103]420 U.S. 103 (1975).

[104]330 N.E.2d 399 (Ind. Ct. App. 1975).

[105]*Id.* at 402. *Cf.* Moore v. State, 312 N.E.2d 485 (Ind. 1975) (A defendant may not raise on appeal denial of counsel at a preliminary hearing unless the absence of counsel in some way resulted in a denial of due process during the defendant's trial).

[106]342 N.E.2d 642 (Ind. Ct. App. 1976).

an option to deposit ten percent of the face amount of the bail with the clerk of the court in order to obtain a conditional release. If the defendant fulfills all conditions until judgment, ninety percent of his cash deposit is returned. Replying to the objection that the amount retained was an illegal court cost, the court of appeals held that the power to set bail procedures is exclusively judicial and includes the power to determine the manner of making bail and to collect administrative fees incurred thereby.[107]

4. Criminal Rule 4—Early Trial

Some confusion has existed regarding the proper application of Criminal Rule 4, which deals with time limits within which a defendant must be brought to trial.[108] There has been uncertainty as to when the time begins to run, what tolls it, and what constitutes delay chargeable to the defendant.

In *State ex rel. Wickliffe v. Judge of Criminal Court*,[109] the Indiana Supreme Court held that a Criminal Rule 4(B)(1) motion[110] for early trial on a felony filed in the Marion County Municipal Court was a nullity because that court has no jurisdiction to try felonies.[111] The early trial motion, in order to have effect, must be filed in the court of jurisdiction *after* it has acquired jurisdiction. Approximately one year later, in an unreported decision, the Indiana Supreme Court dealt with a similar problem under Criminal Rule 4 in the case of *Fowler v. Marion Criminal Court*.[112] The defendant had been released on bond, and thirteen months elapsed before the grand jury returned an indictment. In a hearing on an application for a writ of mandate, the supreme court decided that Criminal Rule 4 does not apply until after the indict-

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[107] *Id.* at 644. A similar bail system was approved by the United States Supreme Court in Schilb v. Knebel, 404 U.S. 357 (1971).

[108] In essence the rule provides that no person shall be held to answer a criminal charge for more than one year provided that the delay is not due to actions of the defendant. IND. R. CR. P. 4.

[109] 328 N.E.2d 420 (1975).

[110] IND. R. CR. P. 4(B)(1) provides:

> Defendant in jail—Motion for early trial. If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy [70] calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy [70] calendar days because of the congestion of the court calendar. Provided, however, that in the last mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as set forth in subdivision (A) of this rule.

[111] IND. CODE § 33-6-1-2 (Burns 1975).

[112] CR 75-434D (Marion Co. Crim. Ct. 4, April 26, 1976).

ment is returned and filed in the court of jurisdiction. During the interim before an indictment is filed in the criminal court, a defendant could challenge the delay based on his sixth amendment right to a speedy and public trial.[113]

In *Moreno v. State*[114] the defendant contended that he was entitled to discharge pursuant to Criminal Rule 4 because he was not brought to trial within one year after the last act of delay chargeable to him. Moreno alleged that he had not authorized his attorney to request a continuance and that, therefore, the delay resulting from the continuance should not be chargeable to him. The Third District Court of Appeals rejected this contention, holding that the defendant is chargeable with the acts of his attorney.[115] Even though the attorney agrees to a continuance requested by the state, the delay is chargeable to the defendant.

The Third District Court of Appeals decision in *Tyner v. State*[116] provides a compendium of answers to frequently raised questions regarding Criminal Rule 4. First, the court noted that although the rule provides that delay due to court congestion should be raised by motion of the State, it is proper for the court to note its crowded calendar sua sponte.[117] Secondly, the court held that the rule, specifying time limits more rigorous than required by the constitutional right to speedy trial, does not have constitutional stature. Third, a defendant will be deemed to have waived his right to discharge if he does not object when, during the time limits of the rule, the court schedules a trial date beyond the prescribed period. Finally, the court held that when a defendant requests a trial date within the one year period, but the trial cannot be scheduled within that time limit because of a congested court calendar, strict compliance with the rule is excused. In such cases the defendant may not complain of failure to bring him to trial during the time prior to his request, even if the court's calendar was not congested during that period.[118]

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[113]The right to a speedy trial is fundamental and therefore is imposed by the due process clause of the fourteenth amendment on the States. *See* Dickey v. Florida, 398 U.S. 30 (1970); Smith v. Hooey, 393 U.S. 374 (1969). *See also* Barker v. Wingo, 407 U.S. 514 (1972).

[114]336 N.E.2d 675 (Ind. Ct. App. 1975).

[115]*Id.* at 684. *See* Holt v. State, 316 N.E.2d 362 (Ind. 1974); Eppo v. State, 244 Ind. 515, 192 N.E.2d 459 (1963); Ford v. State, 332 N.E.2d 221 (Ind. Ct. App. 1975); Collins v. State, 321 N.E.2d 868 (Ind. Ct. App. 1975).

[116]333 N.E.2d 857 (Ind. Ct. App. 1975).

[117]*Id.* at 859. *See* Harris v. State, 256 Ind. 464, 269 N.E.2d 537 (1971).

[118]*Id.* at 859-60. *See* Utterback v. State, 310 N.E.2d 552 (Ind. 1974); Bryant v. State, 261 Ind. 172, 301 N.E.2d 179 (1973).

5. *Criminal Rule 12—Change of Judge*

The automatic right to a change of judge under Criminal Rule 12[119] survived a challenge in *State ex rel. Benjamin v. Criminal Court.*[120] The trial court denied a request for a change of judge upon failure of the defendant to show actual bias or prejudice. The Indiana Supreme Court granted a writ of mandamus, holding that a change of judge must be granted upon the timely filing of an unverified motion and the rule may be changed only by the legislature or by the Indiana Supreme Court on recommendation to the Rules Committee. The Rules Committee met shortly thereafter and declined to change the rule.

F. Trial

1. *Right to Counsel*

In *Faretta v. California*[121] the accused insisted upon representing himself at trial. He demonstrated on the record some knowledge of the law and understanding of the proceedings, but the trial court ruled that he had no right to conduct his own defense and appointed a public defender. The United States Supreme Court held that the sixth amendment guarantees the right of self-representation to a criminal defendant who voluntarily and intelligently waives the right to assistance of counsel. If the state imposes an attorney upon him, it deprives him of his constitutional right to conduct his own defense.

2. *Right to Be Present at Trial*

In *Broeker v. State*[122] the defendant refused to leave the lock-up and appear at his trial. The trial proceeded. However, before each witness was called the defendant was advised of his right to attend the trial and asked if he wished to appear. He continually refused to attend. The First District Court of Appeals held that under these circumstances the defendant knowingly and voluntarily waived his right to be present at trial. It is doubtful that this opinion would authorize trying *in absentia* a defendant who merely fails to appear for unknown reasons.

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[119] IND. R. CR. P. 12 provides: "In all cases where the venue of a criminal action may now be changed from the judge, such change shall be granted upon the execution and filing of an unverified application therefor by the State of Indiana or by the defendant."

[120] 341 N.E.2d 495 (Ind. 1976).

[121] 422 U.S. 806 (1975).

[122] 342 N.E.2d 886 (Ind. Ct. App. 1976).

3. *Presumption of Innocence*

The United States Supreme Court in *Estelle v. Williams*[123] held that an accused may not be compelled to stand trial before a jury while dressed in identifiable prison clothing because to do so would undermine the presumption of innocence. Although the defendant's failure to object negates the compulsion necessary to show a constitutional violation, better practice would suggest that the trial court make a record of the defendant's waiver.

4. *Jury Venire and Voir Dire*

The United States Supreme Court in *Taylor v. Louisiana*[124] clearly indicated that systematic exclusion from jury duty of any class based upon race, religion, or sex is unconstitutional. However, the opinion did not determine whether a state may select its prospective jurors solely from those persons who are registered voters, thereby excluding unregistered voters as a class. Since most criminals are probably not registered voters, such an exclusion would operate to deny them a right to be tried by their peers. The Indiana Supreme Court in *Baum v. State*[125] approved of voter registration lists as an acceptable method for selection of prospective jurors, finding no compelling reason to provide an accused with trial by citizens who are not interested in registering to vote.

Since 1973, when the Indiana Supreme Court in *Robinson v. State*[126] admonished trial courts to assume a more active role in controlling abuses of voir dire,[127] the supreme court has decided at least two cases approving more restrictive voir dire methods utilized by trial courts under Trial Rule 47(A).[128] In *Owens v. State*[129] the trial court conducted some voir dire and then allowed each side twenty minutes in which to address the prospective jurors personally. Counsel were then permitted to submit questions to the judge which, if approved, would be posed by him to the

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[123]425 U.S. 501 (1976).

[124]419 U.S. 522 (1975).

[125]345 N.E.2d 831 (Ind. 1976), also discussed at text accompanying notes 91-94 *supra*.

[126]260 Ind. 517, 297 N.E.2d 409 (1973).

[127]See Harvey, *Civil Procedure and Jurisdiction, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 59, 76 (1974).

[128]IND. R. TR. P. 47(A) provides, "The court shall permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry."

[129]333 N.E.2d 745 (Ind. 1975).

prospective jurors. In *White v. State*[130] the trial judge conducted the voir dire in its entirety, but permitted counsel to submit written questions to the court for possible submission to the panel. In reaffirming that a trial judge has wide discretion in arranging and conducting voir dire, the supreme court held that both of these methods were proper under Trial Rule 47(A).

5. *Opening Statements*

In *Fleetwood v. State*[131] the prosecutor failed to describe in his opening statement all the evidence he intended to present to establish a prima facie case. The defendant contended that this was a fatal omission under Indiana Code section 35-1-35-1, which requires the prescuting attorney to "state the case of the prosecution and briefly state the evidence by which he expects to support it . . . ." In rejecting this contention, the First District Court of Appeals held that the primary purpose of the opening statement is not to inform the accused of the nature of the case but to inform the jury of the charges and the contemplated evidence.[132] The court found that *Blume v. State*,[133] which is frequently cited in support of the defendant's contention, in fact held that the scope of the opening statement is within the discretion of the trial court and that only a clear abuse of such discretion is ground for reversal.

6. *Evidence*

a. Chain of Custody in Drug Prosecutions.—In *Smith v. State*[134] the First District Court of Appeals clarified many commonly held misconceptions regarding chain of custody in drug prosecutions. The court ruled drugs are admissible as real evidence upon proof of a continuous chain of custody from seizure of the drugs until testing, which may be established by showing the continuous whereabouts of the exhibit under circumstances making tampering unlikely. The drugs themselves need not be put into evidence if there is proof of the nature of the substance by chemical analysis. Finally, the court held that a field test alone may be sufficient to prove that the evidence seized was a controlled sub-

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[130]330 N.E.2d 84 (Ind. 1975).

[131]343 N.E.2d 812 (Ind. Ct. App. 1976).

[132]The court noted that this interpretation of the role of opening statements is logically consistent with the rules of pretrial discovery in Indiana, but acknowledged that the prosecution's opening statement may be improper if it is false and prejudicially misleads the defendant regarding the evidence to be presented at trial. *Id.* at 815.

[133]244 Ind. 121, 189 N.E.2d 568 (1963).

[134]345 N.E.2d 851 (Ind. Ct. App. 1976).

stance and questions concerning validity of the field test go to the weight of the evidence and not to its admissibility.

b. Common Scheme or Plan.—It has often been held that evidence of commission of another crime is not admissible at trial unless it is offered to prove a common scheme or plan,[135] identity of the defendent,[136] or intent or motive for committing the crime charged.[137] In *Critchlow v. State*[138] the Indiana Supreme Court held that, in a rape trial, evidence that the defendant commited rape on another victim is admissible under the common scheme or plan exception, even though the other rape was subsequent to the one for which the defendant is being tried.[139]

c. Exhibits of Physical Evidence.—The Indiana Supreme Court in *Keiton v. State*[140] required that the state introduce its physical evidence in a theft case as a part of its case in chief. If it does not do so the defense may strike from the record all relative evidence. In *Pulliam v. State*[141] the court overruled *Keiton*, characterizing the decision as an anomaly without support in law. The state need only introduce testimony concerning the object of the theft, and not the object itself.

d. Evidentiary Harpoon.—In *Brune v. State*[142] a police witness made three impermissible statements at trial, and a motion for mistrial was denied. The First District Court of Appeals in applying the thirteen considerations for determination of mistrial set out by the Indiana Supreme Court in *White v. State*[143] upheld

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[135]Alexander v. State, 340 N.E.2d 366 (Ind. Ct. App. 1976); Miller v. State, 338 N.E.2d 733 (Ind. Ct. App. 1975); Fry v. State, 330 N.E.2d 367 (Ind. Ct. App. 1975).

[136]Cobbs v. State, 338 N.E.2d 632 (Ind. 1975); Smith v. State, 215 Ind. 629, 21 N.E.2d 709 (1939); Crickmore v. State, 213 Ind. 586, 12 N.E.2d 266 (1938).

[137]Jenkins v. State, 335 N.E.2d 215 (Ind. 1975); Franks v. State, 323 N.E.2d 221 (Ind. 1975); Fenwick v. State, 307 N.E.2d 86 (Ind. Ct. App. 1974).

[138]346 N.E.2d 591 (Ind. 1976), also discussed at text accompanying note 199 *infra.*

[139]*Id.* at 597-98. Justice Hunter in his concurring opinion stated that the common scheme or plan exception was not applicable in the case at bar, but that the identity exception was the appropriate rule. The identity exception permits evidence of other crimes to be admitted into evidence if identity is at issue and the other crimes are connected with the present crime in such a way that proof of them naturally tends to identify the defendant as the culprit in the present crime. *Id.* at 601-02 (Hunter, J., concurring).

[140]250 Ind. 294, 235 N.E.2d 695 (1968).

[141]345 N.E.2d 229 (Ind. 1976), also discussed in text accompanying note 68 *supra.*

[142]342 N.E.2d 637 (Ind. Ct. App. 1976).

[143]257 Ind. 64, 272 N.E.2d 312 (1971). In determining whether a mistrial should result because the jury has heard inadmissible evidence, the court reviewed law from other jurisdictions and found thirteen factors to be considered: (1) Constitutional and statutory provisions concerning harmless

the trial court. From *Brune* and other cases it appears the three major considerations are: overwhelming evidence of guilt, statements unintentionally made, and admonitions to disregard given by the court to the jury.

e. Hearsay.—In *Nuss v. State*[144] an issue of self-defense was raised and the trial court excluded as hearsay testimony that the victim had made statements to the defendant's wife threatening the defendant with bodily harm. The First District Court of Appeals, citing *Patterson v. State*,[145] held that the testimony was not hearsay and was therefore admissible. To constitute hearsay a statement must be an out-of-court statement offered in court to establish the truth of the matter asserted. In *Nuss*, the evidence was not offered to prove the truth of the statement, but to show that the defendant had a reasonable belief that his life was in danger and thus acted in self-defense.[146]

f. Intent.—The sufficiency of evidence to establish an intent to commit a felony in a burglary case has been subject to a high standard of review since the Indiana Supreme Court's 1969 decision in *Easton v. State.*[147] In *Carter v. State*[148] the defendant was found to have broken into a building while in possession of a pistol, but there was no evidence of any missing property or the presence of burglary tools. The Third District Court of Appeals found this insufficient evidence of intent. In *Lisenko v. State*[149] the police, called to a building as a result of an alarm, found that a steel door had been pried open. Inside the building, the officers found burglary tools and the defendants with their hands up, indicating a desire to surrender. The court of appeals found this insufficient evidence to establish the necessary intent to commit

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error; (2) the degree of materiality of the inadmissible testimony; (3) other admissible evidence of guilt; (4) other evidence tending to prove the same fact; (5) other evidence tending to "cure" the inadmissible testimony; (6) waiver by the defendant; (7) whether the inadmissible testimony was the result of a voluntary statement by the witness or was solicited by the prosecutor or (8) by the defense; (9) the penalty; (10) the existence of other errors; (11) whether the question of guilt was "close or compelling"; (12) the status and experience of the person giving the testimony; (13) whether the objectionable testimony was repeated. *Id.* at 69, 272 N.E.2d at 314-15.

[144]328 N.E.2d 747 (Ind. Ct. App. 1975), also discussed in text accompanying notes 177-79, 187-89 *infra.*

[145]324 N.E.2d 482 (Ind. 1975), discussed in Marple, *Evidence, infra* at 237.

[146]328 N.E.2d at 753-54.

[147]248 Ind. 338, 228 N.E.2d 6 (1967). In *Easton* the defendant broke into a former girlfriend's house and was found sitting on the couch watching television. The court found proof of these facts insufficient to prove intent to commit a felony.

[148]345 N.E.2d 847 (Ind. Ct. App. 1976).

[149]345 N.E.2d 869 (Ind. Ct. App. 1976).

a felony. Common sense may tell us that the defendants in these cases had no other probable intent than to steal property, but the law continues to dictate otherwise. It would seem that if inferences of intent to kill may be derived from the use of a deadly weapon,[150] or of intent to deprive the owner of the use of property from the exclusive possession of recently stolen goods,[151] it would not be unreasonable to infer intent to commit a felony from unauthorized presence in a building following forced entry.

A conviction for involuntary manslaughter arising from an automobile collision was based upon evidence that the defendant was intoxicated and that he drove across the center line in *Demmond v. State.*[152] The Third District Court of Appeals reversed and, citing the supreme court in *Shorter v. State*[153] and *DeVaney v. State,*[154] held the evidence insufficient to show beyond a reasonable doubt an intent to commit the unlawful act.[155] Although the defendant may have been intoxicated, crossing the center line could have been the result of negligence; thus the State's evidence was insufficient for conviction. However, *DeVaney* and *Shorter* were cases involving reckless homicide[156] and reckless driving[157] rather than involuntary manslaughter. *Demmond* therefore may stand for a new legal principle, requiring proof of intent to drive across the center line, or doing so with a reckless disregard for the consequences, to support a conviction for involuntary manslaughter in motor vehicle cases.[158]

However, the Indiana Supreme Court did find evidence in a murder trial sufficient to sustain proof of transferred intent in the case of *Henderson v. State.*[159] The defendant was convicted of

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[150]Vaughn v. State, 259 Ind. 157, 284 N.E.2d 765 (1972); Liston v. State, 252 Ind. 502, 250 N.E.2d 739 (1969); Petillo v. State, 228 Ind. 97, 89 N.E.2d 623 (1950); Doby v. State, 336 N.E.2d 395 (Ind. Ct. App. 1975); Miller v. State, 307 N.E.2d 889 (Ind. Ct. App. 1974).

[151]Tuggle v. State, 253 Ind. 279, 252 N.E.2d 796 (1969); Hartwell v. State, 321 N.E.2d 228 (Ind. Ct. App. 1974).

[152]333 N.E.2d 922 (Ind. Ct. App. 1975).

[153]234 Ind. 1, 122 N.E.2d 847 (1954).

[154]259 Ind. 483, 288 N.E.2d 732 (1972).

[155]A conviction for involuntary manslaughter under IND. CODE § 35-13-4-2 (Burns 1975) (repealed effective July 1, 1977), requires the state to prove intent to commit the unlawful act beyond a reasonable doubt. Napier v. State, 255 Ind. 638, 266 N.E.2d 199 (1971); Minardo v. State, 204 Ind. 422, 183 N.E. 548 (1932).

[156]IND. CODE § 9-4-1-54 (Burns Supp. 1976).

[157]*Id.* § 9-4-1-54(c).

[158]*Cf.* Broderick v. State, 249 Ind. 476, 231 N.E.2d 526 (1967), sustaining a conviction of involuntary manslaughter arising from a motor vehicle incident on evidence very similar to that in *Demmond.*

[159]343 N.E.2d 776 (Ind. 1976).

first degree murder for shooting with intent to kill one person and actually killing another, unintentionally. The issue was whether the doctrine of transferred intent applies to premeditation. The court held that if the evidence shows a concurrence of the requisite mental states of premeditation and intent with the criminal act, it is sufficient to sustain a first degree murder conviction even when the deceased was not the intended victim.

g. Impeachment.—In *Hall v. State*[160] two different types of impeaching questions were asked of two separate witnesses. When the defendant took the witness stand he was questioned by the prosecutor concerning two prior convictions for auto theft which had occurred twenty years previously. The First District Court of Appeals upheld the question, citing *Ashton v. Anderson,*[161] and found that the age of the conviction does not preclude the state from asking an otherwise proper impeaching question. The age of the prior conviction goes to the weight of the evidence and the credibility of the witness, and is therefore a consideration for the jury. However, the court held improper the defense's cross-examination questions to a state witness concerning his homosexuality, finding that homosexuality per se would not affect the credibility of the witness. In a somewhat radical departure from established practice, the Indiana Supreme Court in *Newman v. State*[162] held that the State must reveal to the jury the existence of a plea bargain with a co-defendant which induced his testimony against his accomplice at trial. Characterizing the plea bargain as something in the nature of a "bribe," the court reversed the conviction because the agreement had not been disclosed.

h. Res Gestae.—In *Thomas v. State*[163] the defendant was convicted of murdering his former girlfriend's new boyfriend, and the trial court admitted evidence of a subsequent abduction and rape of the former girlfriend by the defendant. The Indiana Supreme Court held the evidence admissible as a part of the res gestae. Citing Professor Wigmore,[164] the court found that the murder, the abduction, and the rape were part of a single occurrence. The fact that the subsequent events occur at a different time and place does not impair their admissibility as long as they are part of an entire episode.

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[160]339 N.E.2d 802 (Ind. Ct. App. 1976).

[161]258 Ind. 51, 279 N.E.2d 210 (1972).

[162]334 N.E.2d 684 (Ind. 1975), also discussed in *Kelso, Professional Responsibility, infra.*

[163]328 N.E.2d 212 (Ind. 1975).

[164]*Id.* at 213, *quoting from* 1 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 218, at 719 (3d ed. 1940).

7. Motion for Judgment on the Evidence

In *Kash v. State*[165] the defendant moved for a judgment of acquittal on the evidence at the close of the State's case pursuant to Trial Rule 50.[166] The Third District Court of Appeals held that the motion should be granted only when there is a total absence of evidence of probative value, either from direct evidence or from reasonable inferences, regarding a material element of the offense. Unless this occurs, the case should be submitted to the jury. It should be noted that in a trial to the court, the motion at the close of the state's evidence is for involuntary dismissal under Rule 41(B), and the same standard applies.

8. Defenses

a. Entrapment.—When a defendant invokes the defense of entrapment, the state has the burden of proving that it had probable cause to suspect that the defendant was engaged in illegal conduct before the trap was set.[167] This issue must be determined, as a matter of law, outside the presence of the jury.[168] Once "probable cause to suspect" has been found by the court, the ultimate issue of entrapment is one for the jury.[169] Most cases have dealt with a known suspect allegedly enticed by police tactics to commit an illegal act. However, in *Thomas v. State*[170] the police, with no probable cause to suspect any one individual, sent an informant into various taverns to solicit drug sales. The Indiana Supreme Court rejected the entrapment defense, holding that the informant merely provided an opportunity for the defendant to commit a crime for which he had a natural propensity. The decision seems to eliminate the previously enunciated require-

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[165]337 N.E.2d 573 (Ind. Ct. App. 1975).

[166]IND. R. TR. P. 50(A) provides:

> Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. A party may move for such judgment on the evidence:
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> (1) after another party carrying the burden of proof or of going forward with the evidence upon any one or more issues has completed presentation of his evidence thereon . . . .

This rule supersedes the former motion for directed verdict. However, many still refer to the motion as one for a "directed verdict."

[167]Walker v. State, 255 Ind. 65, 262 N.E.2d 641 (1970).

[168]*Id.* at 72, 262 N.E.2d at 645.

[169]Locklayer v. State, 317 N.E.2d 868 (Ind. Ct. App. 1974).

[170]345 N.E.2d 835 (Ind. 1976).

ment of showing "probable cause to suspect" a known person before the trap may be baited. Now, presumably snaring a guilty person in the trap justifies the trap itself even in the absence of probable cause to suspect that individual. Therefore the entire question of entrapment may now be solely one for the jury, requiring a determination of whether the defendant was an unwary innocent or an unwary criminal.

b. Insanity.—Customarily an examination to determine a defendant's sanity at the time of the crime or at trial is precipitated by a written plea of "not guilty by reason of insanity."[171] However, in *Morris v. State*[172] the defendant's attorney filed a "motion" requesting a psychiatric examination, alleging mental problems but neither insanity at the time of the crime nor incompetency to stand trial. Since the defendant failed to comply with the statutory requirements for pleading insanity,[173] the trial court did not order a psychiatric examination. The Indiana Supreme Court held that the motion, notwithstanding defects in form, was nevertheless sufficient to put the court on notice to order an examination.[174] The failure to do so required reversal.[175]

Although the supreme court is sensitive to any possibility that a defendant may be insane and requires an examination upon minimal allegations, once the examination has been conducted the court has somewhat lightened the procedural burdens on the trial court. As early as 1956 in *Brown v. State*[176] the judge received a psychiatric report that the defendant was competent in all respects, and conducted the trial without a competency hearing. The supreme court held that the right to a hearing is not absolute, but is required only when there are reasonable grounds to believe the defendant is incompetent or insane. A psychiatric report may provide or eliminate such reasonable grounds.

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[171] IND. CODE § 35-5-2-1 (Burns 1975).

[172] 332 N.E.2d 90 (Ind. 1975), also discussed at text accompanying notes 75-80 *supra*, 198 *infra*.

[173] IND. CODE § 35-5-2-1 (Burns 1975).

[174] *See* IND. CODE § 35-5-3.1-1 (Burns 1975).

[175] This decision appears to be contrary to a 1973 decision by the Third District Court of Appeals in Hollander v. State, 296 N.E.2d 449 (Ind. Ct. App. 1973). *Hollander* required a written pleading of insanity as a prerequisite to placing the issue before the trier of fact. The two cases can be distinguished.

Morris deals primarily with the defendant's competency to stand trial while *Hollander* dealt with a plea of not guilty by reason of insanity at the time the crime was committed.

[176] 235 Ind. 186, 131 N.E.2d 777 (1956).

g. Self-defense.—In *Nuss v. State*[177] the First District Court of Appeals restated the elements of self defense as follows: a person who acted without fault in a place where he had a right to be and who was in real or apparent danger of death or great bodily harm may defend against *all* assaults.[178] He may use whatever force he deems necessary even though, by hindsight, it appears that there was no danger at all.[179] The court stressed that this is not merely a permissible defense, but an absolute defense, and any instruction implying that the killing is merely excusable is erroneous. Furthermore, when self-defense is raised, the court should admit all evidence relating the defendant's belief that he was in danger.

In *McDonald v. State*[180] the defendant approached the victim with a knife in hand. The victim threw a bottle at the defendant, striking him but causing no injury. A fight ensued, resulting in the death of the victim. The defendant was convicted of voluntary manslaughter and on appeal alleged that the jury should have been instructed regarding his attempt to withdraw from the fight. The Indiana Supreme Court held that the trial court's refusal of the instruction was proper because there was no evidence to support the alleged attempt to withdraw.

9. Final Arguments

A New York statute permitted the judge at a non-jury criminal trial to deny the defendant and his attorney an opportunity to make a closing argument. The United States Supreme Court in *Herring v. New York*[181] found that the statute denied the defendant his sixth amendment right to counsel, holding that denial of the right to summation in any criminal trial deprives the defendant of his right to make a defense.

10. Jury Instructions

In *Abel v. State*[182] the trial court instructed a jury in a prosecution for theft that they could infer guilt from the defendant's unexplained possession of recently stolen goods. The First District Court of Appeals held this instruction to be im-

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[177]328 N.E.2d 747 (Ind. Ct. App. 1975), also discussed in text accompanying notes 144-46 *supra*, 187-89 *infra*.

[178]*See* Brown v. State, 255 Ind. 594, 265 N.E.2d 699 (1971); King v. State, 249 Ind. 699, 234 N.E.2d 465 (1968).

[179]Heglin v. State, 236 Ind. 350, 140 N.E.2d 98 (1957).

[180]346 N.E.2d 569 (Ind. 1976).

[181]422 U.S. 853 (1975).

[182]333 N.E.2d 848 (Ind. Ct. App. 1975).

proper since it placed an unconstitutional burden on the defendant to prove his innocence.[183] In substance, the decision stands for the proposition that although the jury may draw an inference from such evidence, it is error for the court to say that proof of certain facts or circumstances would, as a matter of law, create a presumption of guilt.[184]

In *Wilson v. State*[185] the jury was instructed that the defendant would receive credit toward his sentence for pre-trial incarceration time. The First District Court of Appeals held this to be reversible error because the penalty for the crime charged was an indeterminate sentence, which is not to be imposed by the jury. Therefore the instruction was not relevant to the sole issue before the jury, guilt or innocence, and, in addition, the instruction may have been prejudicial. The result may have been different, however, if the crime had carried a determinate sentence to be imposed by the jury, since it would then be reasonable to give the jury this information as an aid in determination of the appropriate sentence.

In *Jarrett v. State*[186] the Third District Court of Appeals found erroneous the trial court's refusal to instruct the jury that simple assault was a lesser included offense under a charge of rape. However, the court found the error in this case to be harmless because the defendant was found guilty as charged. The decision does not define the circumstances in which failure to give such an instruction will constitute reversible error.

In a trial for second degree murder, the First District Court of Appeals in *Nuss v. State*[187] held that it is reversible error for the trial court to give an instruction correctly setting out the elements of self-defense, but stating that under such circumstances the killing *"may be excusable."*[188] The court held that self-defense is always an absolute defense to a homicide; therefore an instruction implying otherwise is erroneous. The instruction should have been that a killing under circumstances of self-defense "is excusable."[189]

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[183]*Id.* at 853-54. *See* IND. CODE § 35-41-4-1 (Burns Supp. 1976) (effective July 1, 1977).

[184]*See* Turner v. United States, 396 U.S. 398, 425 (1970) (Black, J., dissenting); Dedrick v. State, 210 Ind. 259, 2 N.E.2d 409 (1936). *Contra,* Turner v. United States, 396 U.S. 398 (1970). *See also* Note, *The Presumption Arising From the Possession of Stolen Property: The Rule in Indiana,* 6 IND. L. REV. 73 (1972).

[185]346 N.E.2d 279 (Ind. Ct. App. 1976).

[186]333 N.E.2d 794 (Ind. Ct. App. 1975).

[187]328 N.E.2d 747 (Ind. Ct. App. 1975), also discussed in text accompanying notes 144-46, 177-79 *supra.*

[188]*Id.* at 753 (emphasis in the original).

[189]*Id.* at 755.

In *Denson v. State*[190] the defendant tendered the following instruction: "The Constitution of Indiana, Article 1, section 18, provides: 'The penal code shall be founded on the principles of reformation and not of vindictive judstice [*sic*],'"[191] basing his authority for the instruction on Article 1, section 19 of the constitution which provides that the jury has the right to determine the law and the facts. Citing *Beavers v. State,*[192] the Indiana Supreme Court held this to be an improper instruction because it would be misleading to a jury. The court stated that the jury must base its decision on existing law; any inference that it may make its own law is improper. Article 1, section 18 is a constitutional admonition to the legislature to follow a certain policy in formulating a new penal code and is not for a jury to consider.

Finally, in a very significant decision, the Second District Court of Appeals in *Snelling v. State*[193] held that it is not error for the trial court to send written instructions to the jury during its deliberations. This practice is within the sole discretion of the trial court. This decision brings Indiana in line wth other states and federal courts, which have permitted this practice for many years.[194]

11. Juror Misconduct and Sequestration

In *Gann v. State*[195] the defendant argued that a bailiff's alleged improper conversation with the jurors during trial was ground for reversal. The Indiana Supreme Court rejected this contention, holding that even if such an allegation is true reversal is not required unless the defendant also shows that he has been prejudiced.[196] This decision negates the "presumption of harm" doctrine previously applied in similar circumstances.[197]

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[190]330 N.E.2d 734 (Ind. 1975).

[191]*Id.* at 737.

[192]236 Ind. 549, 141 N.E.2d 118 (1957).

[193]337 N.E.2d 829 (Ind. Ct. App. 1975), also discussed in Marple, *Evidence, infra* at 238.

[194]*See, e.g.*, Smith v. United States, 349 U.S. 932 (1955); Manfredonia v. United States, 347 U.S. 1020 (1954); Carrado v. United States, 210 F.2d 712, 722-23 (D.C. Cir. 1953), *cert. denied sub nom.* Williams v. United States, 347 U.S. 1018 (1954); Rutledge v. State, 262 S.W.2d 650 (Ark. 1953); Brown v. State, 152 Fla. 508, 12 So. 2d 292 (1943); People v. Monat, 200 N.Y. 308, 93 N.E. 982 (1911).

[195]330 N.E.2d 88 (Ind. 1975).

[196]*Id.* at 91. Misbehavior on the part of a juror, in order to warrant a new trial, must be gross. Probable injury to the defendant must also be shown. IND. CODE § 35-1-42-3 (Burns 1975). Oldham v. State, 249 Ind. 301, 231 N.E.2d 791 (1967); Hatfield v. State, 243 Ind. 279, 183 N.E.2d 198 (1962).

[197]Conrad v. Tomlinson, 258 Ind. 115, 279 N.E.2d 546 (1972); Sparks v. State, 154 Ind. App. 691, 290 N.E.2d 793 (1972); Laine v. State, 154 Ind. App. 81, 289 N.E.2d 141 (1972).

In two cases dealing with sequestered juries, the Indiana Supreme Court seems to be moving in the direction of greater flexibility in the application of certain procedural rules. In the first case, *Morris v. State*,[198] the court held that failure to sequester the jury during trial, over the objection of the defendant, is not reversible error unless it results in prejudice to the defendant. In *Critchlow v. State*[199] the court held permissible the practice of sequestering a jury during deliberation, sending them to a motel for the evening, and resuming deliberation the next day without recording the precise time at which deliberation was interrupted and recommenced.

G. Sentences

Trial courts often complain about a lack of sentencing alternatives for juvenile offenders who are not waivable to a court of criminal jurisdiction. At least two trial courts have made efforts to forge alternatives to commitment to the Indiana Boys' School, and both attempts were defeated by the Indiana Supreme Court. In *State ex rel. Indiana Youth Center v. Howard Juvenile Court*[200] and *State ex rel. Moore v. Superior Court*,[201] juveniles adjudged delinquent were committed to the Indiana Youth Center and the Indiana State Farm, respectively. Although the Indiana Supreme Court sympathized with the frustration of the trial judges dealing with juveniles who commit serious offenses, in each case the court held the commitments invalid under the clear import of the Indiana Code sections prescribing suitable institutions for juveniles[202] and the classes of offenders who are to be sent to the State Farm[203] and the Youth Center.[204] Until the legislature provides otherwise, these commitments are not authorized.

In *Pruett v. State*,[205] following the reversal of his original

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[198]332 N.E.2d 90 (Ind. 1975), also discussed at text accompanying notes 75-80, 171-75 *supra*.

[199]346 N.E.2d 591 (Ind. 1976), also discussed at text accompanying notes 135-39 *supra*.

[200]344 N.E.2d 842 (Ind. 1976).

[201]321 N.E.2d 204 (Ind. 1975).

[202]IND. CODE § 31-5-7-15(2) (Burns Supp. 1976) provides that a juvenile offender sentenced in juvenile court must be committed to a "suitable public institution."

[203]*Id.* §§ 11-2-5-4, 11-3-2-1 (Burns 1973) provide that males between the ages of 7 and 18 may be committed to the Boys' School and mandates commitment of older male juveniles to the State Farm.

[204]The Indiana Youth Center was established as a facility for male offenders over the age of 15 years convicted of a felony. IND. CODE § 11-3-6-1 (Burns 1973).

[205]332 N.E.2d 212 (Ind. 1975).

felony murder conviction, the defendant pleaded guilty at a second trial and was sentenced to life imprisonment. In his petition for post-conviction relief, the defendant sought credit for all jail and prison time served prior to his second conviction. The Indiana Supreme Court, applying principles of equal protection, ordered that he be given full credit for all incarceration on this charge in the same manner as anyone sentenced to prison. Even though a sentence is for life, the credit may be relevant to a grant of executive clemency or to receipt of privileges while in prison.

In *Martin v. State*[206] the statutory authorization for treatment as a drug abuser[207] as an alternative to commitment to the Department of Corrections survived a constitutional attack. Rejecting the contention that the statute constitutes a special or local law forbidden by the Indiana Constitution,[208] the supreme court held that the legislature may provide alternate means of punishment for certain classes of people without offending the constitution. This law applies generally to the needs of a certain class of offenders and therefore is not local or special. The trial court has discretion to order treatment rather than imprisonment.

The Third District Court of Appeals arrived at a similar conclusion with respect to a petition for treatment as a criminal sexual deviant under the Indiana Criminal Sexual Deviancy Act.[209] In *Biggs v. State,*[210] the trial court denied such a petition although the Indiana Department of Mental Health filed a report recommending that the defendant be treated as a criminal sexual deviant. The court of appeals held this denial to be within the discretion of the trial court. In *Pieper v. State,*[211] the defendant, convicted of sodomy and kidnapping, was medically recommended for treatment as a criminal sexual deviant. The trial court found that he was a criminal sexual deviant and committed him to the custody of the Department of Mental Health on the sodomy conviction, but ordered that he serve the life sentence for kidnapping upon his release from treatment. The Indiana Supreme Court held that this procedure was proper under the statute. Even though the law offers a treatment alternative for certain sex crimes, it does not prohibit punishment for other crimes which were incidentally related to the sex crime.

In *Lewis v. State*[212] the court considered the procedure for

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[206]346 N.E.2d 581 (Ind. 1976).
[207]IND. CODE §§ 16-13-7.5-16 to -18 (Burns 1973).
[208]IND. CONST. art. 4, § 22.
[209]IND. CODE § 35-11-3.1-1 to -33 (Burns 1975).
[210]338 N.E.2d 316 (Ind. Ct. App. 1975).
[211]321 N.E.2d 196 (Ind. 1975).
[212]337 N.E.2d 516 (Ind. Ct. App. 1975).

imposing an enhanced penalty authorized for second offenders under the Offenses Against Property Act.[213] The trial court had imposed the increased penalty without holding an evidentiary hearing. The Third District Court of Appeals, citing the Indiana Supreme Court decision in *Lawrence v. State*,[214] held that if factual questions exist concerning the identity of the accused or the validity of prior convictions, due process requires an evidentiary hearing in order to invoke recidivist penalties. If the case in chief was decided by a jury, the penalty should also be tried before a jury in a bifurcated proceeding. The court also held that although the defendant is entitled to notice that an enhanced penalty is being sought, the notice need not be continued in the charging instrument. Recidivist proceedings may be initiated at any time while the trial court has jurisdiction to impose sentence for the substantive offense. Apparently such proceedings may be initiated at the sentencing hearing if the trial has been to the court.

H. Probation and Parole

The United States Supreme Court cases of *Morrisey v. Brewer*[215] and *Gagnon v. Scarpelli*[216] established that an accused is entitled to certain standards of procedural due process in both parole and probation revocation proceedings. However, in *Gagnon* the Court failed to differentiate between the types of limited freedom at issue in the two proceedings and applied identical standards to each. Probation is granted by the sentencing judge, who imposes conditions of freedom; revocation is by the same judge, after a hearing to determine whether a violation has occurred. The minimum standards of due process required are generally afforded by normal judicial proceedings. In contrast, parole is traditionally granted by a board and the parolee is placed under the supervision of an officer who has discretion to decide whether the parolee will remain free. *Morrisey* quite properly held that certain minimum standards of procedural due process should be imposed to avoid arbitrary and capricious revocations initiated by the parole officer. Parole violations are dealt with by nonjudicial personnel who may have taken no part in the decision to release the prisoner or in establishing the conditions of his release. Failure to distinguish between the parole revocation proceedings and probation revocation proceedings has caused considerable confusion among trial courts

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[213] IND. CODE § 35-17-5-12(6) (Burns Supp. 1976) (repealed effective July 1, 1977).

[214] 259 Ind. 306, 286 N.E.2d 830 (1972).

[215] 408 U.S. 471 (1972).

[216] 411 U.S. 778 (1973).

with regard to what may be done, what must be done, and what must not be done. Some trial courts have gone to the extreme of requiring that a new conviction be affirmed on appeal before revocation; some require only probable cause that a crime has been committed; most are somewhere between these extremes. The number of required hearings, the admissibility of evidence, and the burden of proof are among the matters dealt with differently by trial courts because of the lack of clarity in higher court opinions.

In 1973, in *Russell v. Douthitt,*[217] the Indiana Supreme Court relied on *Morrisey* and *Brewer* to hold that a defendant in a parole revocation proceeding is entitled to a "full-blown trial." During the same year, the Second District Court of Appeals in *Ewing v. State,*[218] citing *State ex rel. Gash v. Morgan County Superior Court,*[219] held that probation conditioned on not committing another crime may not be revoked absent conviction of a new crime.

During the Survey period, the First District Court of Appeals in *Dulin v. State*[220] clarified one important issue frequently raised in revocation proceedings by holding that the exclusionary rule does not apply at probation revocation hearings. In *Dulin,* a police officer, upon receipt of an anonymous tip, obtained an invalid warrant to search the defendant's car. The search uncovered marijuana, which was admitted into evidence at the hearing. In reaching its conclusion, the court relied on decisions from other jurisdictions holding the exclusionary rule inapplicable under similar circumstances.[221]

Although the revocation based upon illegally seized evidence was upheld in *Dulin,* one condition of probation was held to be too

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[217]304 N.E.2d 793 (Ind. 1973), noted in Kerr, *Criminal Law and Procedure, 1974 Survey of Recent Developments in Indiana Law,* 8 IND. L. REV. 137, 158-59 (1974).

[218]310 N.E.2d 571 (Ind. Ct. App. 1974).

[219]283 N.E.2d 349 (Ind. 1972). *Gash* may be distinguished because the case did not involve probation, but a suspended sentence.

[220]346 N.E.2d 746 (Ind. Ct. App. 1976).

[221]United States v. Farmer, 512 F.2d 160 (6th Cir.), *cert. denied,* 423 U.S. 987 (1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); United States v. Hill, 447 F.2d 817 (7th Cir. 1971); United States *ex rel.* Sperling v. Fitzpatrick, 426 F.2d 1161 (2d Cir. 1970); United States v. Rushlow, 385 F. Supp. 795 (S.D. Cal. 1974); United States v. Allen, 349 F. Supp. 749 (N.D. Cal. 1972); United States *ex rel.* Lombardino v. Heyd, 318 F. Supp. 648 (E.D. La. 1970); People v. Atencio, 186 Colo. 76, 525 P.2d 461 (1974); People v. Dowery, 20 Ill. App. 738, 312 N.E.2d 682 (1974); State v. Caron, 334 A.2d 495 (Me. 1975); State v. Simms, 10 Wash. App. 75, 516 P.2d 1088 (1973); *Cf.* United States v. Vandemark, 522 F.2d 1019 (9th Cir. 1975); United States v. Winsett, 518 F.2d 51 (9th Cir. 1975).

vague to be enforceable. The condition authorized revocation if "anyone has sufficient grounds to think that he should be arrested or charged."[222] The court held that a condition of probation must be specific in order to justify revocation and that the language in the condition was too vague to be valid. However, another condition of probation, prohibiting use of controlled substances, was sufficiently specific. The court therefore approved revocation for possession of marijuana. It should be noted that although the defendant in *Dulin* had not been convicted of another crime at the time of revocation, he had violated a condition of his probation. *Dulin* thus may be reconciled with *Ewing*.

IX. Domestic Relations

*Judith S. Proffitt**

A. Adoption and Guardianship of Minors

During the survey period, Indiana courts decided two cases[1] concerning the custody of children following the death of a natural or adoptive parent.

In *Bristow v. Konopka*,[2] the First District Court of Appeals was confronted with a unique fact situation requiring construction of the notice provisions of the guardianship statute.[3] A minor child, Misty Dawn Konopka, had been adopted by her

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[222]346 N.E.2d at 747-48.

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[1]*In re* Adoption of Lockmondy, 343 N.E.2d 793 (Ind. Ct. App. 1976); Bristow v. Konopka, 336 N.E.2d 397 (Ind. Ct. App. 1975).

[2]336 N.E.2d 397 (Ind. Ct. App. 1975).

[3]IND. CODE § 29-1-18-14 (Burns Supp. 1976). The statute reads, in pertinent part:

> Notice of hearing on petition for guardianship.—When an application for the appointment of a guardian is filed with the court, notice of the hearing shall be served as follows:
>
> . . . .
>
> (b) When the application is for the appointment of a guardian for a minor, notice shall be served upon the parents or surviving parent of such minor, if the whereabouts of such minor's parents or surviving parent are known, but no other notice shall be necessary unless ordered by the court;

Id.