

## VII. Criminal Law and Procedure

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### A. Merger and Double Jeopardy

*Elmore v. State*<sup>1</sup> probably represents the most significant development in Indiana criminal law during the survey period. The Indiana Supreme Court decision reviewed the meaning of the double jeopardy clauses of the federal<sup>2</sup> and state constitutions<sup>3</sup> and rejected Indiana precedent on the issue of factual merger.<sup>4</sup>

The defendants in *Elmore* had been convicted of theft<sup>5</sup> and conspiracy to commit theft.<sup>6</sup> The court of appeals affirmed the convictions but remanded the case to the trial court for vacation of the sentences for theft "in order to avoid double punishment."<sup>7</sup> Although recognizing that theft was not a lesser included offense within the crime of conspiracy to commit theft, the court of appeals based its decision on the rule that multiple sentences are justified only when "the facts giving rise to the various offenses [are] independently supportable, separate and distinct."<sup>8</sup>

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<sup>1</sup>382 N.E.2d 893 (Ind. 1978).

<sup>2</sup>U.S. CONST. amend. V.

<sup>3</sup>IND. CONST. art. 1, § 14.

<sup>4</sup>382 N.E.2d at 893-98.

<sup>5</sup>IND. CODE § 35-17-5-3 (1971) (repealed 1977).

<sup>6</sup>*Id.* § 35-1-111-1.

<sup>7</sup>375 N.E.2d 660, 667 (Ind. Ct. App.), *vacated*, 382 N.E.2d 893 (Ind. 1978).

<sup>8</sup>*Thompson v. State*, 259 Ind. 587, 592, 290 N.E.2d 724, 727 (1972), *quoted in* 375 N.E.2d at 667. This rule has been characterized as barring punishment for a "separate but related" crime even if the offenses charged were not identical. *Candler v. State*, 266 Ind. 440, 458, 363 N.E.2d 1233, 1243 (1977). Prior to the supreme court decision in *Elmore*, numerous cases in the survey period considered the issue of merger. *See, e.g.*, *Propes v. State*, 382 N.E.2d 910 (Ind. 1978) (murder and conspiracy to murder did not merge); *Cyrus v. State*, 381 N.E.2d 472 (Ind. 1978) (possession of drugs merged into sale); *Pallett v. State*, 381 N.E.2d 452 (Ind. 1978) (assault and battery with intent to kill did not merge into inflicting injury during a felony); *Reed v. State*, 379 N.E.2d 977 (Ind. 1978) (attempted armed felony merged into inflicting injury during a felony, but a conviction for kidnapping arising out of the same transaction was affirmed); *Pinkston v. State*, 377 N.E.2d 1355 (Ind. 1978) (armed robbery merged into inflicting injury during a robbery); *Kruckeberg v. State*, 377 N.E.2d 1351 (Ind. 1978) (possession of drugs normally merges into delivery of drugs, but did not merge under the peculiar circumstances of this case); *Roberts v. State*, 375 N.E.2d 215 (Ind. 1978) (arson merged into murder in the perpetration of arson); *Davis v. State*, 376 N.E.2d 545 (Ind. Ct. App. 1978) (assault and battery with intent to kill merged into first degree burglary).

The Indiana Supreme Court opinion considered the constitutional test for double jeopardy. *Blockburger v. United States*<sup>9</sup> established the rule that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."<sup>10</sup> This test was clarified in later cases decided by the United States Supreme Court<sup>11</sup> so that the *Blockburger* requirement is satisfied "[i]f each [offense] requires proof of a fact that the other does not . . . notwithstanding a substantial overlap in the proof offered to establish the crimes."<sup>12</sup>

The Indiana Supreme Court reasoned that while most Indiana decisions have been consistent with the double jeopardy test,<sup>13</sup> other decisions have been incorrect.<sup>14</sup> The court found that the doctrine of merger, which at common law required the prosecution to drop a misdemeanor charge if the same act constituted a felony of which the defendant was also charged, was not applicable to prosecutions for two felonies.<sup>15</sup> The requirement that multiple offenses be separate and distinct was found to be "misleading in that it tends to shift the court's attention to the identity of the defendant's acts and away from the identity of the offenses he is charged with."<sup>16</sup>

As a result of the *Elmore* decision, the task of courts trying multiple charges arising out of the same transaction will no longer

<sup>9</sup>284 U.S. 299 (1932). The double jeopardy clause was held applicable to the states through the fourteenth amendment in *Benton v. Maryland*, 395 U.S. 784 (1969).

<sup>10</sup>284 U.S. at 304.

<sup>11</sup>*Brown v. Ohio*, 432 U.S. 161 (1977); *Iannelli v. United States*, 420 U.S. 770 (1975).

<sup>12</sup>420 U.S. at 785 n.17, *quoted in* 432 U.S. at 166; 382 N.E.2d at 895.

<sup>13</sup>382 N.E.2d at 895 (citing *Williams v. State*, 373 N.E.2d 142 (Ind. 1978) (felony merged into felony murder); *Candler v. State*, 266 Ind. 440, 363 N.E.2d 1233 (1977) (felony merged into felony murder); *Bobbitt v. State*, 266 Ind. 164, 361 N.E.2d 1193 (1977) (armed robbery merged into inflicting injury during a robbery); *Hudson v. State*, 265 Ind. 302, 354 N.E.2d 164 (1976) (rape merged into conviction for armed rape); *Thomas v. State*, 264 Ind. 581, 348 N.E.2d 4 (1976) (attempted armed robbery merged into infliction of injury during an attempted robbery); *Swininger v. State*, 265 Ind. 136, 352 N.E.2d 473 (1976) (armed robbery merged into inflicting injury during a robbery); *Kokenes v. State*, 213 Ind. 476, 13 N.E.2d 524 (1938) (robbery merged into armed robbery)).

<sup>14</sup>382 N.E.2d at 897-98, *specifically overruling* *Jones v. State*, 369 N.E.2d 418 (Ind. 1977) (theft merged into second degree burglary); *Sansom v. State*, 366 N.E.2d 1171 (Ind. 1977) (theft merged into second degree burglary).

<sup>15</sup>382 N.E.2d at 895-96. The court stated:

It is evident, in light of the doctrine's history and purpose, that common law merger is an inadequate vehicle for resolving modern problems posed where multiple felonies arise from a single criminal act. Accordingly, any language in our decisions which could be read as giving new life to the merger doctrine is hereby disapproved.

*Id.* at 896.

<sup>16</sup>*Id.* at 897.



be to discover whether the crimes were related. Instead, the court will apply traditional double jeopardy analysis and allow prosecution for any charges which have at least one element that is not required to prove the other charges. The court will then sentence the offender for each of the offenses for which there has been a conviction. In addition to clarifying an important issue in Indiana criminal law, the *Elmore* decision will have other significant effects. It will add the threat of multiple charges to the weapons of the prosecution, a tool which likely will be used primarily during plea bargaining. Both during plea bargaining and when the court imposes sentences, defendants affected by this decision may feel the impact of the current Penal Code provision which allows courts to sentence offenders consecutively for each conviction.<sup>17</sup>

Although it is obviously too early to measure the effect of the *Elmore* decision on plea bargaining and sentencing practices, a few cases have subsequently applied that decision's double jeopardy analysis. In *Jones v. State*,<sup>18</sup> the court of appeals held that convictions of both robbery<sup>19</sup> and armed felony<sup>20</sup> did not violate double jeopardy.<sup>21</sup> In *McFarland v. State*,<sup>22</sup> the defendant had been convicted of assault and battery<sup>23</sup> and attempted armed robbery.<sup>24</sup> The court ordered the conviction of assault and battery to be vacated because all of the elements required to prove that crime constituted the violence element of attempted armed robbery.<sup>25</sup> Under the facts of these cases, their decisions are consistent with the *Elmore* rule.<sup>26</sup>

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<sup>17</sup>IND. CODE § 35-50-1-2 (Supp. 1979).

<sup>18</sup>387 N.E.2d 93 (Ind. Ct. App. 1979).

<sup>19</sup>IND. CODE § 35-13-4-6 (1976) (repealed 1977).

<sup>20</sup>*Id.* § 35-23-4.1-2.

<sup>21</sup>387 N.E.2d at 95-96.

<sup>22</sup>384 N.E.2d 1104 (Ind. Ct. App. 1979).

<sup>23</sup>IND. CODE § 35-1-54-4 (1976) (repealed 1977).

<sup>24</sup>*Id.* § 35-12-1-1. At trial, McFarland was in fact convicted of *consummated* armed robbery, although he was charged only with attempted armed robbery. The appellate court determined that conviction of an offense not charged and not qualifying as a lesser included offense of the one charged constituted a denial of due process. 384 N.E.2d at 1109. Consequently, the court corrected the verdict to conform to the charge of attempted armed robbery. *Id.* at 1110.

<sup>25</sup>384 N.E.2d at 1113-14.

<sup>26</sup>*Elmore* involved another issue. The defendants were convicted of both theft and conspiracy to commit theft. It is well established that such offenses are distinct and that, therefore, double jeopardy is not violated by sentences for the inchoate crime of conspiracy and the substantive crime. *Iannelli v. United States*, 420 U.S. 770 (1975). The practical effect of permitting convictions for both conspiracy and the common offense, however, will often be to allow two convictions instead of one for each defendant merely because two or more persons took part in the crime. While some conspiracies represent significant threats to the public safety, many conspiracies are of little consequence other than leading to commission of a crime that would have been committed

### B. Right to Counsel

1. *Self-Representation.*—The Indiana Supreme Court in *Russell v. State*<sup>27</sup> held that a defendant seeking to exercise his *Faretta v. California*<sup>28</sup> right to represent himself at trial must do so “within a reasonable time prior to the day on which the trial begins.”<sup>29</sup> In *Russell*, the request for self-representation was made on the day of trial, before impaneling of the jury. The trial court ruled against the request without holding any hearing concerning Russell’s reasons for wanting to discharge his attorney or Russell’s ability to make a knowing, voluntary, and intelligent waiver of his right to counsel.<sup>30</sup> Whether the demand for pro se representation is timely will depend on a variety of factors: “[T]he type of trial at hand, and the nature and involvement of the pre-trial proceedings. The more complicated the case, and the more involved the pre-trial proceedings, the earlier a ‘reasonable’ assertion will naturally be, and vice-versa.”<sup>31</sup> In *Faretta*, the request was made “weeks before trial”;<sup>32</sup> the *Russell* court indicated that such an early request is not necessary.<sup>33</sup> The court distinguished two lines of decisions on this issue. The rejected approach finds a *Faretta* request timely if made before the jury is impaneled and sworn.<sup>34</sup> The “reasonable time prior to trial” approach which it adopted is that of *People v. Windham*,<sup>35</sup> a California

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as readily by a single criminal. See Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413 (1959). In proposing the Penal Code, the Indiana Criminal Law Study Commission considered barring convictions for any two of the following: Attempt, conspiracy, and a completed crime arising from the conspiracy or attempt. INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT 71-72 (1974). As finally adopted, the Code allows convictions of both conspiracy and the completed crime, but not of attempt and the completed crime or of attempt and conspiracy. IND. CODE § 35-41-5-3 (Supp. 1979). Attempt and the completed crime obviously should not both lead to convictions because such a policy would convert every crime into two offenses. It is difficult to understand the logic that would bar convictions of both conspiracy and attempt, if conspiracy poses such significant dangers to the community regardless of whether the crime is ever attempted or completed, but would allow convictions of both conspiracy and the completed crime.

<sup>27</sup>383 N.E.2d 309 (Ind. 1978).

<sup>28</sup>422 U.S. 806 (1975).

<sup>29</sup>383 N.E.2d at 314.

<sup>30</sup>Both the right to counsel and the right to pro se representation are grounded in U.S. CONST. amend. VI. 422 U.S. at 818-21.

<sup>31</sup>383 N.E.2d at 315.

<sup>32</sup>422 U.S. at 835.

<sup>33</sup>383 N.E.2d at 314.

<sup>34</sup>*Chapman v. United States*, 553 F.2d 886, 893-95 (5th Cir. 1977); *Sapienza v. Vincent*, 534 F.2d 1007, 1010 (2d Cir. 1976); *State v. Nix*, 327 So. 2d 301, 353-54 (La. 1975), cert. denied sub nom. *Fulford v. Louisiana*, 425 U.S. 954 (1976).

<sup>35</sup>19 Cal. 3d 121, 127-29, 560 P.2d 1187, 1191-92, 137 Cal. Rptr. 8, 12-13, cert. denied, 434 U.S. 848 (1977). See also *Barnes v. State*, 258 Ark. 565, 570-72, 528 S.W.2d



Supreme Court decision. The *Windham* court stated that following an untimely request for pro se representation the trial court should inquire into the reasons underlying the request and should balance the defendant's interests against the interference with the trial to arrive at the decision.<sup>36</sup> While adopting the *Windham* test of reasonableness, the *Russell* court did not adopt the hearing requirement of *Windham*. In *Russell*, the court held that a hearing on pro se representation was necessary only after the defendant had made a request that was both unequivocal<sup>37</sup> and timely.<sup>38</sup> The court's rationale for barring day-of-trial *Faretta* motions was that it would avoid the potential for disruption and delay that such requests would create.<sup>39</sup> The disruption feared by the *Russell* majority may have been illusory because the trial court could have proceeded to trial immediately after holding a brief hearing to discover the defendant's reasons for wanting to represent himself, explaining the disadvantages of self-representation, and then deciding within its discretion whether to allow the defendant to represent himself at trial.

2. *Representation of Codefendants.*—*Hudson v. State*<sup>40</sup> applied the rule of *Martin v. State*<sup>41</sup> that a court's appointment of the same

370, 374-75 (1975). Because the defendant in *Windham* waited to make his request for pro se representation until the third day of trial, the court had no need to rule as broadly as it did. The court could have held simply that the right of a defendant to discharge a counsel and proceed to represent himself is greatly diminished once the trial has begun. The decision most often cited for this rule is *United States ex rel. Maldonado v. Denno*, 348 F.2d 12 (2d Cir. 1965), *cert. denied sub nom. DiBlasi v. McMann*, 384 U.S. 1007 (1966), in which the court held that

[o]nce the trial has begun with the defendant represented by counsel, however, his right thereafter to discharge his lawyer and to represent himself is sharply curtailed. There must be a showing that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance.

348 F.2d at 15.

<sup>36</sup>19 Cal. 3d at 127-29, 560 P.2d at 1191-92, 137 Cal. Rptr. at 12-13.

<sup>37</sup>See *Anderson v. State*, 370 N.E.2d 318 (Ind. 1977), *cert. denied*, 434 U.S. 1079 (1978).

<sup>38</sup>383 N.E.2d at 315.

<sup>39</sup>*Id.* In *German v. State*, 373 N.E.2d 880 (Ind. 1978), the Indiana Supreme Court faced a similar situation, except that in *German* the jury had been sworn before the defendant made a *Faretta* request. The court held that the trial court had properly refused a continuance to the defendant, lest "[a] defendant's freedom of choice of counsel . . . be used as a device to manipulate or subvert the orderly procedure of the courts." *Id.* at 883. The *German* court appeared to require that a hearing be held on the reasons for the *Faretta* request even if the request is made after the trial has begun.

<sup>40</sup>375 N.E.2d 195 (Ind. 1978).

<sup>41</sup>262 Ind. 232, 238, 314 N.E.2d 60, 66 (1974). This rule is also recognized by decisions listed in *Martin. Id.* at 238 n.1, 314 N.E.2d at 66 n.1.

counsel for codefendants does not represent a denial of the constitutional guarantee of assistance of counsel in criminal trials<sup>42</sup> unless the codefendants are shown to have conflicting interests.<sup>43</sup> Although joint representation of codefendants is not per se improper, courts apply a strict test to determine whether the right to counsel has been violated.<sup>44</sup>

The appellant in *Hudson* and his codefendant Edwards were tried together, with representation by the same court-appointed counsel. Hudson was convicted of infliction of injury in the perpetration of a robbery, whereas Edwards was convicted of a lesser offense. On appeal, Hudson claimed to have been denied effective representation of counsel as a result of events at the close of the trial. After both sides had presented evidence, the court inquired whether either defendant would change his plea to guilty regarding a lesser offense. Edwards agreed to do so, but Hudson refused. The trial court accepted the changed plea and then called Edwards to the bench and asked him whether Hudson was telling the truth in denying his presence at the scene of the crime. Edwards said that Hudson was present at the scene. Upon receiving this answer, the trial court sentenced Edwards to one year in the Indiana State Farm and Hudson to life imprisonment.

The Indiana Supreme Court repeated the *Martin* rule<sup>45</sup> and then confused the issue involved here with the issue of competence of counsel:

However, the fact that one attorney is appointed to represent co-defendants does not establish either that his efforts were ineffective or that the defendant lacked undivided assistance of counsel. . . . We have consistently held that there is a strong presumption that counsel has competently discharged his duties. This presumption is overcome only by a showing that his actions were a mockery of justice, shocking to the conscience of the court.<sup>46</sup>

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<sup>42</sup>U.S. CONST. amend. VI.

<sup>43</sup>375 N.E.2d at 197.

<sup>44</sup>*Glasser v. United States*, 315 U.S. 60 (1941): "Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness. . . . The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 75-76. See generally Annot., 34 A.L.R.3d 470 (1970).

<sup>45</sup>375 N.E.2d at 197. The court referred not to *Martin*, but to *United States v. Langston*, 194 F. Supp. 891 (W.D. Pa. 1961); this Article refers to *Martin* because it was an Indiana decision and was more recently decided than *Langston*.

<sup>46</sup>375 N.E.2d at 197 (citation omitted).



This confusion of legal tests, noted by the dissent,<sup>47</sup> is clearly inconsistent with the stringent language of *Glasser v. United States*.<sup>48</sup> Although it is clear from the opinions in *Hudson* that the joint representation of Edwards and Hudson involved no conflicting loyalties for the attorney prior to the defense's resting of its case, an obvious conflict appeared subsequent to that time, and it then became improper for the attorney to continue as counsel for both defendants. It was in Edwards' interest to answer the court's question about Hudson's involvement in the crime—cooperation might have influenced the court to impose a mild sentence. It was in Hudson's interest to not have the court's question answered, because it amounted to an admission of evidence not subject to the right of cross-examination. A zealous attorney for Edwards would have welcomed the question, while a zealous attorney for Hudson would have objected to it. As the dissent recognized:

Trial counsel was placed in a position of divided allegiance by the question . . . . [A] criminal defendant who declines to plead guilty, wisely or unwisely, is entitled to a defense unhindered by his attorney's conflicting duty to safeguard a co-defendant's plea bargain. Appellant was denied this, and his conviction should therefore be reversed.<sup>49</sup>

In another decision on this question, the Indiana Supreme Court in *Ross v. State*<sup>50</sup> ruled without direct precedent that it is not reversible error for a court to appoint partners in a law firm as counsel for separate codefendants with conflicting interests.<sup>51</sup>

It is rare for courts to reverse convictions on the ground of incompetency of defense counsel. For such a reversal, Indiana courts require a showing that the "actions or inactions of the attorney . . . made the proceedings a mockery of justice."<sup>52</sup> This test has been modified by requiring "'adequate legal representation at each stage of the proceeding.'"<sup>53</sup> The Indiana Supreme Court in *Cottingham v. State*<sup>54</sup> refused to adopt a standard of "'reasonably competent assistance of an attorney acting as [a] diligent conscientious advocate.'"<sup>55</sup>

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<sup>47</sup>*Id.* (DeBruler, J., dissenting).

<sup>48</sup>315 U.S. 60, 75-76 (1941). The *Glasser* standard appears at note 44 *supra*.

<sup>49</sup>375 N.E.2d at 198.

<sup>50</sup>377 N.E.2d 634 (Ind. 1978).

<sup>51</sup>*Id.* at 637. The dissent would have reversed the conviction on the theory that the partners should be treated as a single counsel, whose representation of codefendants with conflicting legal needs would obviously have been a deprivation of the guarantee of assistance of counsel. *Id.* at 637-68 (DeBruler, J., dissenting).

<sup>52</sup>*Cottingham v. State*, 379 N.E.2d 984, 986 (Ind. 1978).

<sup>53</sup>*Id.* (quoting *Thomas v. State*, 251 Ind. 546, 557, 242 N.E.2d 919, 925 (1969)).

<sup>54</sup>379 N.E.2d 984 (Ind. 1978).

<sup>55</sup>*Id.* at 986 (quoting *United States v. DeCoster*, 159 U.S. App. D.C. 326, 331, 487 F.2d 1197, 1202 (1973)).

One decision during the survey period found incompetence of counsel. *Lyles v. State*<sup>56</sup> involved an appeal from a conviction for armed robbery. The prosecutor offered to recommend a sentence of one to five years if the defendant would plead guilty to theft. The defense counsel left the room and returned to inform the prosecutor and judge that Lyles would not agree to the bargain. The counsel told Lyles that no plea bargain had been offered by the prosecutor. Trial then led to conviction of an offense more serious than theft and a sentence of ten years.

The decision whether to plead guilty or stand trial is a right belonging to the accused.<sup>57</sup> The counsel's decision not to advise Lyles of the proposed plea bargain prevented Lyles from making an intelligent and knowing decision about pleading guilty or standing trial, and was thus held to represent a denial of "effective assistance of counsel at a critical stage of the proceedings."<sup>58</sup>

### C. Search and Seizure

The Indiana Court of Appeals ruled in *Clark v. State*<sup>59</sup> that the prosecution should be barred from introducing into evidence a search warrant when the defendant does not object to the introduction of the seized items.<sup>60</sup> This decision rejects the rule of *Mata v. State*<sup>61</sup> and *George v. State*<sup>62</sup> that "[a] conviction cannot be sustained where [the] search warrant under which the evidence had been obtained is not introduced in evidence . . . . The court erred in admitting the evidence of the officers, over appellant's objection."<sup>63</sup> The *Mata* rule, as noted by the *Clark* court, has continued to be accepted as valid by recent Indiana appellate decisions.<sup>64</sup> The *Clark* court, however, found that the *Mata* rule had served a special purpose which was no longer appropriate: it had afforded "protection against over-zealous enforcement of the Prohibition laws."<sup>65</sup>

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<sup>56</sup>382 N.E.2d 991 (Ind. Ct. App. 1978).

<sup>57</sup>*Id.* at 993 (citing *Abraham v. State*, 228 Ind. 179, 185, 91 N.E.2d 358, 360 (1950)).

<sup>58</sup>382 N.E.2d at 994.

<sup>59</sup>379 N.E.2d 987 (Ind. Ct. App. 1978).

<sup>60</sup>*Id.* at 988-89. *Accord*, *Carey v. State*, 389 N.E.2d 357 (Ind. Ct. App. 1979).

<sup>61</sup>203 Ind. 291, 179 N.E. 916 (1932).

<sup>62</sup>210 Ind. 592, 1 N.E.2d 583 (1936).

<sup>63</sup>203 Ind. at 298, 179 N.E. at 918.

<sup>64</sup>379 N.E.2d at 988 n.3 (citing *Hardin v. State*, 265 Ind. 179, 181, 353 N.E.2d 462, 463 (1976); *Roberts v. State*, 164 Ind. App. 354, 355, 328 N.E.2d 429, 430 (1975)).

<sup>65</sup>379 N.E.2d at 988. While *Mata* was a Prohibition-era case charging unlawful possession of intoxicating liquors, *George* involved a prosecution for the crime of petit larceny. The *Clark* court erroneously referred to both decisions as involving the charge of unlawful possession of intoxicating liquors. *Id.* This error does not affect significantly the *Clark* court's arguments, although it does lessen the claim that the *Mata* rule was primarily based upon the experience with Prohibition laws.



In *Highsaw v. State*,<sup>66</sup> the Indiana Supreme Court considered the scope of a search warrant. A reliable informant told police that she saw heroin used and sold at Highsaw's residence. Based upon this information, a search warrant was issued to search the residence and Highsaw. Police officers approaching the residence saw Highsaw driving a car down the street, stopped him and, upon searching him, found heroin in his hand. The issue on appeal was whether the warrant justified the police search of Highsaw when he was not at the residence, or whether the warrant allowed a search of him only if present at the residence. The court found the warrant to be validly issued and to authorize the search of Highsaw at any place,<sup>67</sup> but the dissent argued that there was no probable cause for a search of the defendant and that such a search would be justified by the warrant only if it took place at the specified residence.<sup>68</sup>

It is clear that the search would have been illegal had the warrant only authorized the search of the residence.<sup>69</sup> Although the warrant met the constitutional requirement of particularly describing the object of the search,<sup>70</sup> the problem was whether there was probable cause for the search of Highsaw's person. The evidence referred to by the court indicated only that there was probable cause to believe that heroin would be found at a residence alleged to be under the control of the defendant. The court recited no other connection between the defendant and the heroin, which was the object of the search, thus providing no probable cause to justify a warrant for the search of Highsaw apart from the search of the residence. Given this, and the lack of circumstances justifying a warrantless stop and search of Highsaw, the court should have excluded the seized heroin from evidence in the trial.<sup>71</sup>

#### D. Confessions and Admissions

In *Rogers v. State*,<sup>72</sup> the Indiana Supreme Court weakened the protection accorded to defendants incriminated by the admission

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The most significant rationales for the *Clark* decision are that the search warrant is relevant only to the court's decision on admissibility of evidence and that it and the probable cause affidavits often, as here, "contain statements highly prejudicial to the defendant." *Id.* at 989. The trial court's admonishment to the jury to disregard the prejudicial information rendered the error harmless. *Id.* While the *Mata* rule refers only to search warrants, the contents of the probable cause affidavit are significant because that affidavit is incorporated within the warrant. IND. CODE § 35-1-6-3 (1976).

<sup>66</sup>381 N.E.2d 470 (Ind. 1978).

<sup>67</sup>*Id.* at 471.

<sup>68</sup>*Id.* at 472 (DeBruler, J., dissenting).

<sup>69</sup>*United States v. Di Re*, 332 U.S. 581, 587 (1948).

<sup>70</sup>U.S. CONST. amend. IV.

<sup>71</sup>*Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>72</sup>375 N.E.2d 1089 (Ind. 1978).

into evidence of out-of-court statements made by codefendants not testifying at trial. Rogers was convicted of first degree murder and murder in the perpetration of a robbery, arising from a robbery by five men of a Gary, Indiana tavern and a killing which took place during the robbery. Four men were tried jointly for the crimes. A fifth man, James, testified for the State and implicated the four defendants by statements made prior to trial, although not at the trial itself. Statements of two codefendants, Stone and Williams, who did not testify at the trial, were admitted into evidence after deletion of the names and numbers of the codefendants as required by statute.<sup>73</sup> The court reasoned that the existence of numerous defendants made each statement less likely to implicate any other defendant than would be true if there were only two codefendants and that there was "a great deal of evidence"<sup>74</sup> against Rogers other than the codefendants' statements. Based on this reasoning, the court held that any error in admitting the statements was harmless.<sup>75</sup>

The *Rogers* court distinguished the facts before it from those in *Sims v. State*,<sup>76</sup> decided in the previous year. In *Sims*, codefendants Sims and Irons were convicted of first degree murder. Each made a confession implicating the other, although each defendant accused the other of firing the shot which killed the victim. Instead of granting the defendants' motions for separate trials, the trial court deleted from each confession the name of the other defendant, either leaving

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<sup>73</sup>IND. CODE § 35-3.1-1-11(b) (1976) provides in part:

Whenever two (2) or more defendants have been joined for trial in the same indictment or information and one (1) or more defendants move for a separate trial because another defendant has made an out-of-court statement which makes reference to the moving defendant but is not admissible as evidence against him, the court shall require the prosecutor to elect one of the following courses:

- (1) a joint trial at which the statement is not admitted into evidence;
- (2) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted; or
- (3) granting the moving defendant a separate trial.

The statute was enacted as a response to the decision in *Bruton v. United States*, 391 U.S. 123 (1968). *Sims v. State*, 358 N.E.2d 746, 747 (Ind. 1977). In *Bruton*, the United States Supreme Court held that "because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." 391 U.S. at 126. A confessing defendant may not bar introduction of a codefendant's confession implicating the first defendant. *Parker v. Randolph*, 439 U.S. 978 (1979).

<sup>74</sup>375 N.E.2d at 1091.

<sup>75</sup>*Id.* at 1090-91.

<sup>76</sup>358 N.E.2d 746 (Ind. 1977).



a blank or inserting the letter "X." This was found insufficient to constitute the effective deletion required by the statute.<sup>77</sup> Although each of the confessions was admissible against the person who made it, the confessions could not be used against the codefendants. In *Sims*, no evidence was introduced other than the confessions, so their admission constituted reversible error.<sup>78</sup> The policy behind *Sims* was further discussed by the Indiana Supreme Court in *Carter v. State*:<sup>79</sup>

In the case before us, as in *Sims* . . . , it probably was impossible to delete references to the declarants' co-defendants effectively and yet retain any semblance of the meanings. . . . In holding that the deletions made by the trial court were not "effective" we have regard for the policy pronounced in *Bruton* . . . , and that is that a co-defendant shall not be tainted by the out-of-court declarations of a non-testifying defendant. . . . [I]t will require more than a fig leaf to shield the non-declarants from the declarations of a declaring co-defendant. *In consequence, there probably will be but few such statements that are susceptible to effective deletion within the meaning of the statute.*<sup>80</sup>

The *Rogers* court found the precedent of *Sims* unpersuasive for several reasons. First, the number of defendants in *Rogers* was greater than two: "Since the number involved is so large [four defendants, five perpetrators of the crime], the insertion from time to time of 'blank' does not necessarily incriminate anyone."<sup>81</sup> Second, the amount of other evidence against Rogers made harmless any error in admitting the codefendants' statements. An eyewitness to the shooting identified Rogers. The victim had fired several shots and Rogers was wounded that night. Rogers had stated to police that he was shot at the tavern where the victim was shot during an exchange of gunfire with the robbers.

The dissent ably discussed the retreat made by the majority from the holdings in *Sims* and *Carter*. It rejected the argument that

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<sup>77</sup>*Id.* at 748 (referring to IND. CODE § 35-3.1-1-11(b) (1976)).

<sup>78</sup>*Id.* at 747. It is clear that a violation of the *Bruton* rule can, despite its constitutional basis, be held to be harmless error. *Harrington v. California*, 395 U.S. 250 (1969). In *Harrington*, the Court found "the case against *Harrington* . . . so overwhelming that [it concluded that the] violation of *Bruton* was harmless beyond a reasonable doubt" and rejected the view that "a departure from constitutional procedures should result in an automatic reversal, regardless of the weight of the evidence." *Id.* at 254.

<sup>79</sup>361 N.E.2d 145 (Ind. 1977).

<sup>80</sup>*Id.* at 148 (emphasis added). The court found admission of the statements to be harmless error because "a jury could not have properly done other than convict." *Id.*

<sup>81</sup>375 N.E.2d at 1091.

the presence of numerous codefendants diminishes the harm to a defendant from introduction of the redacted statement.<sup>82</sup> It further questioned the majority's holding that any error was harmless because there was ample evidence against Rogers other than the codefendants' confessions.<sup>83</sup> *Carter* had imposed a much more stringent standard for finding such error to be harmless:

To us, there is a vast difference between evidence that is ample, that is to say evidence that would prevail upon review over a claim of insufficiency, and evidence that is so convincing that a jury could not properly find against it. When we find the latter, we are warranted in a determination that error was harmless beyond a reasonable doubt.<sup>84</sup>

Justice Prentice wrote the dissent in *Rogers*<sup>85</sup> and attempted to limit the *Rogers* holding in *Gutierrez v. State*:<sup>86</sup>

Neither *Rogers v. State, supra*, its progeny, nor *Carter v. State, supra*, should be interpreted to render redaction, by substitution of a blank for a name, either appropriate or inappropriate, solely upon the basis of the number of participants in the events related or upon the number of defendants being tried jointly or sought to be tried jointly. Rather, the test is whether or not the proposed redaction is effective to shield a defendant from taint from the out-of-court declarations of a nontestifying defendant.<sup>87</sup>

Another case decided in the past year also interpreted the statute governing admission of statements by nontestifying codefendants which implicate other defendants.<sup>88</sup> *Fox v. State*<sup>89</sup> involved a statement which implicated Fox without actually naming him. The court of appeals found that both the policy and language of *Bruton v. United States*<sup>90</sup> required application of the statute.<sup>91</sup> The dissent argued that the statute proscribes references to the defendant, rather than inferences about the defendant.<sup>92</sup> The majority reasoned that because the statute has repeatedly been held applicable to

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<sup>82</sup>*Id.* at 1092-93 (Prentice, J., dissenting). Another justice concurred on this point. *Id.* at 1093-94 (DeBruler, J., concurring).

<sup>83</sup>*Id.* at 1093 (Prentice, J., dissenting).

<sup>84</sup>361 N.E.2d at 148, *quoted in* 375 N.E.2d at 1093 (Prentice, J., dissenting).

<sup>85</sup>375 N.E.2d at 1092-93 (Prentice, J., dissenting).

<sup>86</sup>388 N.E.2d 520 (Ind. 1979).

<sup>87</sup>*Id.* at 527.

<sup>88</sup>IND. CODE § 35-3.1-1-11 (1976).

<sup>89</sup>384 N.E.2d 1159 (Ind. Ct. App. 1979).

<sup>90</sup>391 U.S. 123 (1968). *See* note 73 *supra*.

<sup>91</sup>384 N.E.2d at 1170-71.

<sup>92</sup>*Id.* at 1176-77 (Buchanan, C.J., dissenting).



statements in which references to a defendant have been deleted, leaving only an inference prejudicing the defendant, the same policy should apply here, where there was never a direct reference to the defendant, but where there was a prejudicial inference.<sup>93</sup>

### *E. Defendant's Presence at Trial*

In two recent decisions, Indiana courts considered the effect of a defendant's absence from the courtroom during part of trial proceedings. The right of the accused to be present at trial is guaranteed by both the federal<sup>94</sup> and state constitutions,<sup>95</sup> and was guaranteed by a since-repealed Indiana statute.<sup>96</sup> An obvious exception is made where the defendant's conduct so interferes with the trial to prevent it from proceeding without removal of the defendant.<sup>97</sup> In *Howard v. State*,<sup>98</sup> the supreme court held that the defendant may waive his right to be present at trial.<sup>99</sup> The defendant, accused of being a habitual criminal, stated that he did not wish to be present during the trial of that charge. The trial then proceeded in his absence. The dissent argued that the right to be present at a trial is not merely a personal right of the defendant, and hence waivable, but also is designed to foster public confidence in the criminal justice system; therefore, the right should not be waivable even if the defendant freely and voluntarily chooses to be tried in absentia.<sup>100</sup>

In *Skinner v. State*,<sup>101</sup> the Indiana Supreme Court found no error

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<sup>93</sup>*Id.* at 1170-71 (quoting 361 N.E.2d at 148). A contrary result was reached by the supreme court after the survey period ended. The court in *Deaton v. State*, 389 N.E.2d 293 (Ind. 1979), although not citing *Fox*, appeared to adopt the same reasoning as Chief Judge Buchanan's dissent in *Fox*.

<sup>94</sup>U.S. CONST. amend. VI.

<sup>95</sup>IND. CONST. art. 1, § 13.

<sup>96</sup>IND. CODE §§ 35-1-28-1 to -2 (1976) (repealed 1978).

<sup>97</sup>*Illinois v. Allen*, 397 U.S. 337 (1970).

<sup>98</sup>377 N.E.2d 628 (Ind. 1978), *cert. denied*, 99 S. Ct. 727 (1979). This decision is consistent with the holding of the United States Supreme Court in *Illinois v. Allen*, 397 U.S. at 342-43.

<sup>99</sup>377 N.E.2d at 630. The majority discussed the issue very briefly and wrote that this rule was established by *Harris v. State*, 249 Ind. 681, 231 N.E.2d 800 (1967), *cited in* 377 N.E.2d at 630. The reliance on *Harris* was misplaced because that decision merely established that even if the defendant's right to be present at trial could be waived, that waiver must be given expressly by the defendant. 249 Ind. at 688, 231 N.E.2d at 804. *See also* *Miles v. State*, 222 Ind. 312, 319, 53 N.E.2d 779, 782 (1944). *Harris* never ruled on the propriety of a waiver in this situation, but did find the error to be harmless. 249 Ind. at 691-93, 231 N.E.2d at 804-06.

<sup>100</sup>377 N.E.2d at 630-31 (DeBruler, J., dissenting). The dissent's argument was based on the statute, not the constitutional guarantees. This argument is of little value for the future because the statute has been repealed. Act of Mar. 9, 1978, Pub. L. No. 2, § 3555, 1978 Ind. Acts 2 (repealing IND. CODE §§ 35-1-28-1 to -2 (1976)).

<sup>101</sup>383 N.E.2d 307 (Ind. 1978).

in an instruction advising the jury that it could take into account the unexplained absence of the defendant from the conclusion of the trial.<sup>102</sup> The instruction did not state that the defendant's absence implied guilt, but did allow the jury to draw any conclusions it might from the absence.<sup>103</sup> The dissent argued that the defendant's absence was irrelevant to a determination of guilt or innocence and thus should not have been the subject of any instruction.<sup>104</sup>

### F. Speedy Trial Rule

The decision in *Arch v. State*<sup>105</sup> represents a weakening of the speedy trial rule.<sup>106</sup> Arch was convicted of first degree murder and claimed on appeal that the trial court had erred in not granting him discharge pursuant to Criminal Rule 4(B)(1). Arch was incarcerated before trial and moved for an early trial on April 26, 1976. Absent any continuance or delay caused by his own acts, Arch was entitled to have his trial begin, pursuant to his motion, before July 5, 1976. On June 2, the court scheduled a readiness conference for June 28; however, the record failed to indicate that the defendant was notified of this conference. The June 28 conference was not held. On July 2, the court set Arch's trial for October 18. The readiness conference was held July 26. On August 31, the defendant filed for discharge, which was denied by the court on September 16. The trial commenced on December 13.

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<sup>102</sup>*Id.* at 308.

<sup>103</sup>The instruction read as follows: "The failure of a defendant to appear for completion of his trial after the State has presented its case in prosecution of the defendant, is a circumstance which may be considered by you in connection with all the other evidence to aid you in determining his guilt or innocence." *Id.* at 309.

<sup>104</sup>*Id.* (DeBruler, J., dissenting).

<sup>105</sup>381 N.E.2d 465 (Ind. 1978).

<sup>106</sup>IND. R. CR. P. 4(B)(1) provides:

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.

IND. R. CR. P. 4(A) provides that no defendant shall be jailed before trial for more than six months without a trial, subject to exceptions involving delays or continuances by the defendant or congestion of the court calendar. IND. R. CR. P. 4(C) requires trials within one year of filing of charges, subject to similar exceptions. Together, these provisions constitute the "speedy trial" rules consistent with the constitutional requirement that "[j]ustice shall be administered . . . speedily, and without delay." IND. CONST. art. 1, § 12.



Arch contended that his right to a speedy trial was abridged on July 5, and thus his discharge should have been ordered. It is clear from the record that he was not responsible for any delays or continuances prior to that date. Had Arch acquiesced before July 5 in the setting of a trial date after that deadline, he would have been found to have waived his right to a speedy trial.<sup>107</sup> The Indiana Supreme Court found such acquiescence from two facts: (1) Arch knew that the scheduling of the readiness conference at such a short time before July 5 made it almost certain that the trial date would be set after that date, and (2) he failed to object to the court's schedule of proceedings before July 5.<sup>108</sup>

The court supported this second rationale by reference to *Buchanan v. State*<sup>109</sup> and *Serrano v. State*.<sup>110</sup> These cases fail to support the *Arch* decision because in *Buchanan* and *Serrano* the defendants failed to object to trial dates set before the speedy trial deadline had passed, whereas in *Arch* the defendant did not know the trial date until long after July 5 had passed. The argument that setting the initial readiness conference for June 28 notified the defendant that the trial would be set for a date after July 5 has two problems. First, the record does not show any notice to the defendant of the setting of the June 28 date; thus, he could not have been expected to have knowledge of the court's intentions.<sup>111</sup> Second, even if the defendant knew of the date scheduled for the conference, it was still possible for the court to schedule the trial after June 28, but before the expiration of the seventy-day period set by the speedy trial rule.

The applicability of Criminal Rule 4(B) to a person awaiting trial on a charge while incarcerated in Indiana on a prior offense was examined in *State v. Laslie*.<sup>112</sup> The defendant in *Laslie*, incarcerated on an unrelated charge, sought an early trial under Criminal Rule 4(B).<sup>113</sup> Affirming the trial court's discharge of the indictment against

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<sup>107</sup>It has been stated that "[t]he waiver arises only where the defendant learns, within the period during which he could be properly brought to trial, that the court proposes trial on a date that is not timely. He then must object or he will be considered to have acquiesced." *Wilson v. State*, 361 N.E.2d 931, 934 (Ind. Ct. App. 1977) (citing *Bryant v. State*, 261 Ind. 172, 301 N.E.2d 179 (1973)).

<sup>108</sup>381 N.E.2d at 467.

<sup>109</sup>263 Ind. 360, 332 N.E.2d 213 (1975).

<sup>110</sup>266 Ind. 126, 360 N.E.2d 1257 (1977).

<sup>111</sup>*Wilson v. State* established that the state has the duty to bring the defendant to trial within the times provided by the speedy trial rules and that the defendant does not have "the affirmative duty to discover what the court records might disclose. . . . To hold otherwise would, in fact, place upon him the burden of securing his right to speedy trial." 361 N.E.2d at 934.

<sup>112</sup>381 N.E.2d 529 (Ind. Ct. App. 1978).

<sup>113</sup>Although *Laslie* erroneously sought dismissal under IND. R. CR. P. 4(A), which was not applicable to his situation, the trial and appellate courts viewed the request as if it had been filed under IND. R. CR. P. 4(B). *Id.* at 530.

Laslie because his motion for speedy trial was not honored within the prescribed seventy-day limit, the Indiana Court of Appeals held that the early trial request should have been honored under the circumstances of the case.<sup>114</sup> Although the rule is not applicable to persons serving prison sentences outside Indiana because of the administrative difficulties encountered in obtaining permission from the authorities of other states to try these persons in Indiana courts,<sup>115</sup> the court found that these difficulties did not exist when the person was incarcerated in Indiana; therefore, Criminal Rule 4(B) applied.<sup>116</sup>

### G. *Presence at Scene of Crime*

Presence of the defendant at the scene of a crime does not by itself justify the conclusion that the accused participated in the crime.<sup>117</sup> However, presence may be considered together with other facts and circumstances to find guilt.<sup>118</sup> The evidence in *Fox v. State*<sup>119</sup> was held insufficient to justify conviction of four defendants allegedly present during the commission of arson.<sup>120</sup> Defendants Fox, Havens, York, Perry, and Kapp spent the evening drinking together at taverns in Grant County. At one tavern, Fox cursed police officer Mowery and made vague comments which might be construed as threats to him. Later during the night, a building that Mowery owned, which was close to his house, was burned down.<sup>121</sup> Mowery's wife stated that she saw three men near where the blaze began and two

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<sup>114</sup>*Id.* at 532.

<sup>115</sup>*Id.* See also *Hart v. State*, 260 Ind. 137, 140, 292 N.E.2d 814, 815-16 (1973); *Fossey v. State*, 254 Ind. 173, 180-81, 258 N.E.2d 616, 620 (1970).

<sup>116</sup>381 N.E.2d at 532. When the accused is incarcerated in Indiana, "the State has ready access to the accused and bringing him to trial will have no deleterious effect on the State administration of justice." *Id.*

<sup>117</sup>*Bond v. State*, 257 Ind. 95, 272 N.E.2d 460 (1971); *Conrad v. State*, 369 N.E.2d 1090 (Ind. Ct. App. 1977); *Pruitt v. State*, 333 N.E.2d 874 (Ind. Ct. App. 1975).

<sup>118</sup>*Simmons v. State*, 262 Ind. 300, 315 N.E.2d 368 (1974); *Cotton v. State*, 247 Ind. 56, 211 N.E.2d 158 (1965). As an exception to the rule that presence at the scene of the crime does not establish complicity, certain relationships between the defendant and the crime victim, such as a parent-child relationship, impose on a defendant present during the crime the duty to attempt to stop the criminal act. *Mobley v. State*, 227 Ind. 335, 85 N.E.2d 489 (1949).

<sup>119</sup>384 N.E.2d 1159 (Ind. Ct. App. 1979). Another aspect of this case is discussed *supra* at text accompanying notes 89-93.

<sup>120</sup>*Id.* at 1165-66.

<sup>121</sup>The building was found to be "part or parcel of [the] dwelling house" as required by the arson statute. IND. CODE § 35-16-1-1 (1976) (repealed 1977). The court's discussion of the meaning of that phrase, 384 N.E.2d at 1162-63, continues to be relevant to the current statute, IND. CODE § 35-43-1-1 (Supp. 1979), although the current statute refers only to "dwelling" and omits the phrase "part or parcel."



others in the car.<sup>122</sup> Her description of the car, which matched the one driven by the defendants; a footprint matching Kapp's, which was found at the scene of the crime; and other evidence made reasonable the jury's conclusion that some or all of the defendants were at the scene of the arson.

Assuming that the five defendants were all present at the Mowery property at the time of the fire and that Kapp's footprint conclusively established his presence outside the car near the building set on fire, the court faced two problems. One was that the evidence did not show whether those in the car were guilty of the offense charged.<sup>123</sup> The other was that the evidence failed to show which of the remaining defendants were in the car and which outside.<sup>124</sup>

For a person to be convicted as an accessory or accomplice to a crime, it is necessary that the accused both knew that a felony was being committed and made some overt act in support of the felony.<sup>125</sup> Approval of the crime is insufficient to convict the accessory or accomplice unless communicated to the principal.<sup>126</sup> The court may infer aiding and abetting from "*failure to oppose [the crime] at the time, companionship with another engaged therein, and a course of conduct before and after the offense . . .*"<sup>127</sup> The *Fox* court found

<sup>122</sup>Because the court reversed the convictions on other grounds, it did not have to consider whether the trier of fact could reasonably have believed Mrs. Mowery's testimony that three men were outside the car and two in it, when that testimony was first given at the trial 13 months after the crime and differed from her statement given the day after the crime, which mentioned only the three men outside the car. 384 N.E.2d at 1172 (Miller, J., concurring).

<sup>123</sup>Although the offense charged was arson, the statute relevant to this question is that concerning accessories and accomplices. IND. CODE § 35-1-29-1 (1976) (repealed 1977). The issue in *Fox* continues to be significant under the current statute. See IND. CODE § 35-41-2-4 (Supp. 1979).

<sup>124</sup>The court stated:

Because there is insufficient evidence to sustain the convictions of the two individuals that were inside the car, and since there is no evidence indicating who those individuals were, how can we, as an appellate court, pick and choose which of the four remaining appellants were inside that car? The answer is: We cannot. It is fundamental to our system of law that guilt is individual.

384 N.E.2d at 1166 (footnote omitted) (citing *Delgado v. United States*, 327 F.2d 641, 642 (9th Cir. 1964)).

<sup>125</sup>*Pace v. State*, 248 Ind. 146, 148-49, 224 N.E.2d 312, 313-14 (1967).

<sup>126</sup>*Id.* The defendant in *Pace* was the driver of a car in which one passenger robbed another. The defendant's conviction was reversed, even though the court found sufficient evidence to show that Pace knew that the crime was being committed, because no evidence showed Pace's involvement in the crime and Pace had no duty to try to stop its commission. *Id.* at 149, 224 N.E.2d at 314.

<sup>127</sup>384 N.E.2d at 1174 (quoting 247 Ind. at 61-62, 211 N.E.2d at 161 (Buchanan, C.J., dissenting)).

that the evidence may have justified only a suspicion, not an inference, that the appellants knew of a criminal plan to commit arson.<sup>128</sup>

#### H. Constructive Possession of Drugs

Several cases decided during the survey period involved the doctrine of constructive possession of illegal drugs. To establish a defendant's possession of the drugs, the State must show an "intent and capability to maintain control and dominion"<sup>129</sup> over the substance. The intent element is bifurcated, requiring proof that the defendant knew of the presence of the drug and of its character.<sup>130</sup> Although such intent will be inferred if the accused had exclusive possession of the place where the drugs were found,<sup>131</sup> additional evidence of incriminating statements or circumstances is required when the possession was nonexclusive.<sup>132</sup>

Two appellate decisions considered what evidence would be sufficient to justify the inference of intent in cases of nonexclusive possession of drugs. In *Edwards v. State*,<sup>133</sup> the defendant Edwards shared an apartment with his brother and the latter's girl friend. Pursuant to a valid search warrant for controlled substances, police entered the apartment and discovered amphetamines in the refrigerator. Edward's conviction for possession of a controlled substance was reversed for lack of "evidence from which the reasonable inference could be drawn that Tim Edwards knew of the amphetamines and had control of them."<sup>134</sup> Among the kinds of evidence which would have supported that inference would have been proof of attempted escape or destruction of contraband, confession, close proximity of the defendant to drugs in plain view, or resistance to the police.<sup>135</sup>

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<sup>128</sup>384 N.E.2d at 1166.

<sup>129</sup>*Thomas v. State*, 260 Ind. 1, 4, 291 N.E.2d 557, 558 (1973) (citing *People v. Fox*, 24 Ill. 2d 581, 585, 182 N.E.2d 692, 694 (1962)); *Greely v. State*, 158 Ind. App. 212, 215, 301 N.E.2d 850, 851-52 (1973).

<sup>130</sup>*Martin v. State*, 372 N.E.2d 1194 (Ind. Ct. App. 1978).

<sup>131</sup>260 Ind. at 5, 291 N.E.2d at 559 (quoting *Feltes v. Colorado*, 178 Colo. 409, 414-15, 498 P.2d 1128, 1131 (1972)); *Martin v. State*, 372 N.E.2d at 1198; *Phillips v. State*, 160 Ind. App. 647, 651, 313 N.E.2d 101, 103-04 (1974).

<sup>132</sup>*Greely v. State*, 158 Ind. App. at 215, 301 N.E.2d at 852: "[The inference that the homeowner possessed the contraband must be supported by] some evidence to show that he had at least some knowledge of the presence of the material." See generally Annot., 56 A.L.R.3d 948 (1974).

<sup>133</sup>385 N.E.2d 496 (Ind. Ct. App. 1979).

<sup>134</sup>*Id.* at 497.

<sup>135</sup>*Id.* at 498. See, e.g., *Ledcke v. State*, 260 Ind. 382, 386, 296 N.E.2d 412, 416 (1973) (large quantities of marijuana found being processed and defendant's attempted flight); *Hutcherson v. State*, 381 N.E.2d 877, 879 (Ind. Ct. App. 1978) (defendant's flight



*Johnson v. State*<sup>136</sup> indicated other kinds of evidence which might support the inference that a person in possession of premises is also constructively in possession of drugs found therein. Police with a valid warrant searched the home in which Pinner, Johnson, and several other persons lived. The officers found traces of heroin and materials used to inject heroin in the room shared by Johnson and Pinner, as well as in the upstairs bathroom where Pinner was having her hair groomed at the time of the search. The prosecution failed to prove any of the following factors which might have led to affirming Pinner's conviction:

[T]hat she was under the influence of any drug, nor were any unused packets of heroin found secreted in the house . . . that she knew of the presence of the discarded paraphernalia or that the contents of the wastebaskets were in plain view, or that Pinner would recognize either the nature of the residue or the significance of the empty packets. In addition, she apparently did not attempt to flee, or attempt to conceal the wastebaskets or their contents, or behave in any way as if she had guilty knowledge.<sup>137</sup>

In *Ingle v. State*,<sup>138</sup> the Indiana Court of Appeals used the doctrine of constructive possession of drugs as justification for police officers to search an entire house. In *Ingle*, police legitimately in a house saw marijuana in plain view and made arrests. Based upon their suspicion that other persons might be in the house and the fact that those other persons might be found to have constructive possession of the discovered marijuana, the police were held entitled to look through the house for other persons.<sup>139</sup> Because this extensive search was valid, the prosecution was able to introduce into evidence the large amount of marijuana found by the police in plain view in the basement.

### I. *Sudden Heat in Manslaughter*

Cases during the survey period considered whether sudden heat

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and drugs in plain view); *Cooper v. State*, 357 N.E.2d 260, 265 (Ind. Ct. App. 1976) (contraband found on front seat of car which defendant had just been driving); *Mills v. State*, 163 Ind. App. 608, 613, 325 N.E.2d 472, 474-75 (1975) (methadone in plain view); *Puckett v. State*, 163 Ind. App. 258, 262, 322 N.E.2d 716, 718-19 (1975) (defendant's misrepresentation of identity when receiving a trunk containing marijuana and possession of the combination to the trunk); *Thurman v. State*, 162 Ind. App. 267, 278-79, 319 N.E.2d 151, 157-58 (1974) (defendant's admission and location of a substantial quantity of drugs under pillow on defendant's bed).

<sup>136</sup>376 N.E.2d 542 (Ind. Ct. App. 1978).

<sup>137</sup>*Id.* at 544.

<sup>138</sup>377 N.E.2d 885 (Ind. Ct. App. 1978).

<sup>139</sup>*Id.* at 889.

is an element necessary for conviction of manslaughter<sup>140</sup> and whether a judge can properly instruct a jury about manslaughter absent any proof of sudden heat.<sup>141</sup> Although both decisions arose from prosecutions under pre-Penal Code statutes,<sup>142</sup> their rulings are pertinent to similar provisions under current laws.<sup>143</sup>

Although both prior and current statutes define manslaughter as including sudden heat, Indiana courts have held that proof of sudden heat is not an element of the crime,<sup>144</sup> but rather serves to reduce what otherwise would have been murder to a lesser crime.

In *Neff v. State*,<sup>145</sup> the defendant was charged with voluntary manslaughter and found guilty of beating to death his stepdaughter. The beating appeared to have lasted several hours and to have included hitting, whipping, knocking her head against the floor, and attempted drowning. Neff claimed that the State had failed to show either a sudden heat or adequate provocation for sudden heat, thus rendering his conviction improper. The appellate court held that sudden heat serves only as a means of disproving the element of malice in the crime of murder and must automatically be found when malice is either disproved or not alleged: "[F]or there could be no such thing as an unlawful intentional killing without malice, unless it was done upon a sudden heat."<sup>146</sup> The court also noted that the State conceded there was no malice and that there was "evidence of anger and sudden resentment of appellant against the deceased"<sup>147</sup> and other factors justifying a reasonable inference that the crime had been committed "without malice in a sudden heat."<sup>148</sup>

In *O'Conner v. State*,<sup>149</sup> the Indiana Court of Appeals recognized that it was bound to follow the rule that sudden heat was not an ele-

<sup>140</sup>*Neff v. State*, 379 N.E.2d 473 (Ind. Ct. App. 1978).

<sup>141</sup>*O'Conner v. State*, 382 N.E.2d 994 (Ind. Ct. App. 1978).

<sup>142</sup>IND. CODE § 35-13-4-2 (1976) (repealed 1977) provided in part: "Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, is guilty of manslaughter . . . ."

<sup>143</sup>IND. CODE § 35-42-1-3 (Supp. 1979) provides: "(a) A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter . . . . (b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1(1) of this chapter to voluntary manslaughter."

<sup>144</sup>*Holloway v. State*, 352 N.E.2d 523 (Ind. Ct. App. 1976). The Indiana Supreme Court, in dictum, in *McDonald v. State*, 264 Ind. 477, 346 N.E.2d 569 (1976), indicated: "[I]f sufficient evidence is presented to the jury by which it could find murder in the first or second degree, the jury may also return a verdict of guilty of voluntary manslaughter, notwithstanding the absence of proof of 'sudden heat.'" *Id.* at 483, 346 N.E.2d at 574. See also *Neff v. State*, 379 N.E.2d at 479.

<sup>145</sup>379 N.E.2d 473 (Ind. Ct. App. 1978).

<sup>146</sup>*Id.* at 479 (quoting *Hasenfuss v. State*, 156 Ind. 246, 249, 59 N.E. 463, 465 (1901)).

<sup>147</sup>379 N.E.2d at 480.

<sup>148</sup>*Id.*

<sup>149</sup>382 N.E.2d 994 (Ind. Ct. App. 1978).



ment of manslaughter,<sup>150</sup> but found error in the trial court's instructing the jury, in a trial for second degree murder, that it could find O'Conner guilty of voluntary manslaughter despite the absence of any evidence showing sudden heat.<sup>151</sup> The court reasoned that an instruction is proper only if there is evidence to support it<sup>152</sup> and that the evidence in this case failed to show sudden heat, which is required to prove voluntary manslaughter.<sup>153</sup> This argument appears to contradict the court's earlier grudging acceptance of the validity of the conviction for voluntary manslaughter without proof of sudden heat. Although a reasonable argument can be made for the proposition that sudden heat should be considered an element of voluntary manslaughter, once that claim has been rejected it appears logical that proof of murder can justify a manslaughter conviction and that a court can properly instruct to that effect.

### *J. Rape Shield Law*

Several decisions within the survey period upheld the constitutionality of Indiana's rape shield law.<sup>154</sup> In addition, the 1979 Indiana General Assembly amended the law to extend its protection to the reputations of witnesses other than the victim of the alleged sex crime.<sup>155</sup>

Rape shield statutes have been enacted by many states within the last decade.<sup>156</sup> Their purpose is to eliminate the embarrassment suffered by victims of sexual assaults upon cross-examination about their unrelated sexual activities prior to the alleged rape or other sex crime. Proponents of these statutes hoped to "protect a prosecutrix from . . . baseless, irrelevant, and grotesque harassments,"<sup>157</sup> and to encourage victims of sex offenses to report the crimes, free of the fear of being harassed or humiliated when put on the witness stand. Indiana's statute,<sup>158</sup> enacted in 1975, bars the admission of or reference to evidence of past sexual conduct of a vic-

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<sup>150</sup>*Id.* at 1000.

<sup>151</sup>*Id.* at 1001.

<sup>152</sup>*Id.* (quoting *Hash v. State*, 258 Ind. 692, 698, 284 N.E.2d 770, 774 (1972)).

<sup>153</sup>382 N.E.2d at 1000.

<sup>154</sup>IND. CODE §§ 35-1-32.5-1 to -4 (Supp. 1979).

<sup>155</sup>Act of Apr. 2, 1979, Pub. L. No. 289, 1979 Ind. Acts 1481 (codified at IND. CODE §§ 35-1-32.5-1 to -4 (1976 & Supp. 1979)).

<sup>156</sup>For a good discussion of the recent changes in law and public perceptions of the crime of rape, see Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977). See *id.* at 32 n.196 for a list of the rape shield statutes throughout the nation.

<sup>157</sup>*Roberts v. State*, 373 N.E.2d 1103, 1107 (Ind. 1978).

<sup>158</sup>Act of Apr. 11, 1975, Pub. L. No. 322, 1975 Ind. Acts 1768 (codified as amended at IND. CODE §§ 35-1-32.5-1 to -4 (1976 & Supp. 1979)).

tim of an alleged sex crime, except under limited circumstances.<sup>159</sup>

The defendant in *Roberts v. State*<sup>160</sup> claimed that the statute unconstitutionally discriminated by sex, violated his right to confront witnesses,<sup>161</sup> and represented an improper interference by the legislature with the judicial process. The Indiana Supreme Court summarily rejected all of these arguments.<sup>162</sup> The constitutionality of the statute was again upheld, with a fuller discussion of the issues, by the court in *Lagenour v. State*.<sup>163</sup> In *Lagenour*, the defendant, who was accused of kidnapping and assault and battery with intent to gratify sexual desires, sought to introduce evidence of past sexual activities of the prosecuting witness and of two other witnesses who had testified that the defendant had on unrelated occasions assaulted them sexually. The trial court refused to admit such evidence. The supreme court ruled that the statute did not apply to all of the proposed lines of questioning but that the trial court's exercise of its discretionary power to exclude evidence did not violate the defendant's rights to due process and confrontation.<sup>164</sup> The court found no indication that the judge's application of the statute foreclosed the defense counsel from any line of questions which would otherwise have been admissible in evidence.<sup>165</sup>

As the court reasonably construed the statute, "the rape shield law does not apply to victims of separate crimes nor to the victim of a kidnapping."<sup>166</sup> The general assembly acted promptly to remove one of these limitations. It amended the rape shield law so that it now restricts admission of evidence of the past sexual conduct not only of the victim of the sexual assault, but also of any "witness other than the accused."<sup>167</sup>

The defendant in *Finney v. State*<sup>168</sup> raised numerous constitutional objections to the rape shield law; among them were claims of violations of his rights to confront witnesses and to equal protection of the laws.<sup>169</sup> The court of appeals rejected the confrontation clause

<sup>159</sup>The exceptions allow admission for purposes of impeachment of any felony conviction arising out of prior sexual acts which the court, after an in camera proceeding, determines to be material and to have probative value which outweighs its inflammatory or prejudicial nature. See IND. CODE §§ 35-1-32.5-1 to -4 (1976 & Supp. 1979).

<sup>160</sup>373 N.E.2d 1103 (Ind. 1978).

<sup>161</sup>U.S. CONST. amend. VI; IND. CONST. art. 1, § 13.

<sup>162</sup>373 N.E.2d at 1107.

<sup>163</sup>376 N.E.2d 475 (Ind. 1978).

<sup>164</sup>*Id.* at 479.

<sup>165</sup>*Id.*

<sup>166</sup>*Id.*

<sup>167</sup>Act of Apr. 2, 1979, Pub. L. No. 289, 1979 Ind. Acts 1481 (codified at IND. CODE §§ 35-1-32.5-1 to -4 (1976 & Supp. 1979)).

<sup>168</sup>385 N.E.2d 477 (Ind. Ct. App. 1977).

<sup>169</sup>U.S. CONST. amend. XIV.



argument on the authority of *Lagenour* and *Roberts*.<sup>170</sup> Although the right to confrontation would have been abridged if the trial court had barred the defense from presenting all impeachment evidence concerning the victim in this rape trial,<sup>171</sup> the appellate court found that this partial limitation did not violate the confrontation clause.<sup>172</sup> As to the claimed breach of the equal protection clause, the court found that rape defendants are not a suspect classification and that the State need therefore prove only that the statute has a rational and reasonable basis for the classification which discriminated against them.<sup>173</sup> The legislature's finding that the statute was needed to protect rape victims from embarrassment and to encourage them to report the crimes provided such a basis.

### K. Sentencing

The decision in *Perry v. State*<sup>174</sup> clarifies an issue regarding consecutive sentencing of convicted offenders in Indiana. By statute, the trial court must decide whether terms of imprisonment imposed for more than one conviction should be imposed concurrently or consecutively;<sup>175</sup> there is, however, one circumstance under which the court is required to impose consecutive sentences.<sup>176</sup> The exception occurs when a crime is found to have been committed by a person who has previously been arrested for another crime and who has not been discharged from probation, parole, or imprisonment from the first crime by the time of the commission of the second offense. The main impetus behind passage of this exception was undoubtedly to make more severe the penalties received by persons released from jail on bond or on their own recognizance who are accused of a subsequent crime while awaiting trial on the former charge, and

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<sup>170</sup>385 N.E.2d at 479-80.

<sup>171</sup>*Davis v. Alaska*, 415 U.S. 308 (1974); *U.S. v. Duhart*, 511 F.2d 7 (6th Cir. 1975); *Snyder v. Coiner*, 510 F.2d 224 (4th Cir. 1975); *U.S. v. Harris*, 501 F.2d 1 (9th Cir. 1974).

<sup>172</sup>385 N.E.2d at 479 (citing *Brooks v. State*, 259 Ind. 678, 291 N.E.2d 559 (1973); *Borosh v. State*, 166 Ind. App. 378, 336 N.E.2d 409 (Ind. Ct. App. 1975)).

<sup>173</sup>385 N.E.2d at 480.

<sup>174</sup>379 N.E.2d 531 (Ind. Ct. App. 1978).

<sup>175</sup>IND. CODE § 35-50-1-2(a) (Supp. 1979) provides: "Except as provided in subsection (b) of this section, the court shall determine whether terms of imprisonment shall be served concurrently or consecutively." It is likely that judges will make this determination upon criteria similar to those listed in *id.* § 35-4.1-4-7 for determining whether a crime is aggravated or mitigated for purposes of deciding upon a sentence.

<sup>176</sup>*Id.* § 35-50-1-2(b) provides:

If a person commits a crime: (1) after having been arrested for another crime; and (2) before the date he is discharged from probation, parole, or a term of imprisonment imposed for that other crime; the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried and sentences are imposed.

who are convicted of both charges. A less frequent use of this statute involves crimes committed by persons incarcerated at the time of the subsequent crime. The defendant in *Perry* was convicted of eight counts of attempted forgery and attempted possession of controlled substances.<sup>177</sup> Because Perry was on parole at the time of the instant crimes, the statute applied regarding mandatory consecutive sentences. The trial judge interpreted the statute as requiring him to sentence Perry to eight consecutive terms, to run upon the termination of the sentence for which he had been on parole. The court of appeals rejected this interpretation of the statute, holding instead that the judge was required to make the sentences on the new convictions begin at the termination of the prior sentence, but that the judge had discretion in determining whether the new sentences were to be served consecutively.<sup>178</sup>

### L. Legislative Developments

Several other changes in Indiana criminal law were made by the legislature in 1979. Penalties outside Title 35 of the Indiana Code were changed to fit within the classifications of the Penal Code.<sup>179</sup> Receipt, retention, or disposal of stolen property was made a separate offense<sup>180</sup> instead of being within the definition of theft,<sup>181</sup>

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<sup>177</sup>The appellate court found that the evidence supported only one conviction of attempted possession of a controlled substance. 379 N.E.2d at 533.

<sup>178</sup>*Id.* at 534-35.

<sup>179</sup>Act of Apr. 6, 1979, Pub. L. No. 87, §§ 1, 2, & 4-5, 1979 Ind. Acts 390. The Penal Code contains the substantive criminal law of Indiana and was enacted in 1976. Indiana Penal Code, Pub. L. No. 148, 1976 Ind. Acts 718 (codified at IND. CODE §§ 35-44 to -50 (Supp. 1979)). All prohibited acts with attendant penalties are grouped into four classes of felony, IND. CODE §§ 35-50-2-4 to -7 (Supp. 1979); murder, *id.* § 35-50-2-3; three classes of misdemeanor, *id.* §§ 35-50-3-2 to -4; and three classes of infractions, *id.* §§ 35-50-4-2 to -4. The infractions covered by the 1979 act involve regulation of motor carriers, Act of Apr. 6, 1979, Pub. L. No. 87, § 1, 1979 Ind. Acts 390 (codified at IND. CODE § 8-2-7-41 (Supp. 1979)); issuance of motor vehicle licenses, Act of Apr. 6, 1979, Pub. L. No. 87, § 2, 1979 Ind. Acts 390 (codified at IND. CODE § 9-1-4-37 (Supp. 1979)); and endangered species, Act of Apr. 6, 1979, Pub. L. No. 87, §§ 4-5, 1979 Ind. Acts 390 (codified at IND. CODE §§ 14-2-8.5-4, -7 (Supp. 1979)).

<sup>180</sup>Act of Apr. 2, 1979, Pub. L. No. 300, § 2(b), 1979 Ind. Acts 1491 (codified at IND. CODE § 35-43-4-1 (Supp. 1979)): "A person who knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of theft commits receiving stolen property, a Class D felony."

<sup>181</sup>IND. CODE § 35-43-4-2(a) (Supp. 1979). In proposing the consolidation of numerous crimes into a single crime of theft, the Indiana Criminal Law Study Commission criticized prior law as "duplicitous and cumbersome." INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT 98 (1974) [hereinafter cited as PENAL CODE: PROPOSED FINAL DRAFT]. The statute prior to enactment of the Penal Code required proof of "knowingly . . . obtain[ing] control over stolen property knowing the property to have been stolen by another . . . ." IND. CODE § 35-17-5-3(1)(f) (1976)



and the definition of prostitution was enlarged to cover massage parlor activities not previously covered.<sup>182</sup> Penalties were increased for batteries against children<sup>183</sup> and for violations of firearms regula-

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(repealed 1977). The Penal Code requirement that the person "knowingly or intentionally exerts unauthorized control over property of another person . . . ," *id.* § 35-43-4-2(a) (Supp. 1979), changed the prior statute's requirement that the holder of stolen property must know that it was stolen; the Indiana Criminal Law Study Commission commented that this was a relaxation of the requirement but that it was "not dispensed with entirely since the actor under the proposed chapter must know or have a firm belief that the control he is exerting is unauthorized." PENAL CODE: PROPOSED FINAL DRAFT 99. It is doubtful if the 1979 statute changes the requirements for conviction of receipt of stolen property. The wording could be read as requiring that one "knowingly or intentionally receives, retains, or disposes of the property of another," and that the property be shown to be stolen, without any proof that the person charged knew that it was stolen. Act of Apr. 2, 1979, Pub. L. No. 300, § 2(b), 1979 Ind. Acts 1491 (codified at IND. CODE § 35-43-4-1 (Supp. 1979)). The culpability section, IND. CODE § 35-41-2-2 (Supp. 1979), provides that the standard of culpability, here "knowingly or intentionally," applies to "every material element of the prohibited conduct." Thus the logical reading of the 1979 amendment is that the State would have to prove the accused's knowledge that the property was stolen, as well as the knowing or intentional receipt, retention, or disposition of the property.

<sup>182</sup>Act of Apr. 10, 1979, Pub. L. No. 301, 1979 Ind. Acts 1493 (codified at IND. CODE § 35-45-4-2 (Supp. 1979)). Added to the definition of prostitution is receiving payment for fondling or agreeing to fondle the genitals of another person. The same acts are added to the definition of patronizing a prostitute. Act of Apr. 10, 1979, Pub. L. No. 301, 1979 Ind. Acts 1493 (codified at IND. CODE § 35-45-4-3 (Supp. 1979)). This statute is designed to allow for prosecution of acts alleged to be performed frequently at massage parlors. The other criminal statute that has been used to prosecute such acts concerns public indecency, which covers "(a) [a] person who knowingly or intentionally, in a public place: . . . (4) fondles the genitals of himself or another person . . ." IND. CODE § 35-45-4-1 (Supp. 1979). A problem with applying that statute to the massage parlor situation is that arguably a massage parlor is not a public place. Other means have been attempted by governmental authorities to restrict the operations of massage parlors. The Indiana Supreme Court in *City of Indianapolis v. Wright*, 371 N.E.2d 1298 (Ind. 1978), upheld an Indianapolis ordinance, INDIANAPOLIS-MARION COUNTY, IND., CODE § 17-729 (1975), which, among other provisions, prohibited persons employed at massage parlors from touching or offering to touch the genital or sexual area of any person. For a discussion of constitutional issues involved in the Indianapolis ordinance, see *Constitutional Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 69, 73-76 (1979). Another method of attacking these establishments would be to claim that they constitute public nuisances and attempt to close them as a result. See Fahringer & Cambria, *The New Weapons Being Used in Waging War Against Pornography*, 7 CAPITOL U. L. REV. 553 (1978); Hogue, *Regulating Obscenity Through the Power to Define and Abate Nuisances*, 14 WAKE FOREST L. REV. 1 (1978); *Porno non est pro bono publico: Obscenity as a Public Nuisance in California*, 4 HASTINGS CONST. L.Q. 385 (1977); *Restricting the Public Display of Offensive Materials: The Use and Effectiveness of Public and Private Nuisance Actions*, 10 U.S.F.L. REV. 232 (1975); *Can an Adult Theater or Bookstore Be Abated as a Public Nuisance in California?*, 10 U.S.F.L. REV. 115 (1975).

<sup>183</sup>Act of Apr. 4, 1979, Pub. L. No. 298, 1979 Ind. Acts 1490 (codified at IND. CODE § 35-42-2-1 (Supp. 1979)).

tions committed by persons with prior felony convictions within fifteen years,<sup>184</sup> and sentences were made nonsuspendible for several drug-related offenses.<sup>185</sup> Persons sentenced to life sentences have, with one exception, been made eligible for parole.<sup>186</sup> Trial courts have been stripped of their discretionary authority to allow persons convicted of serious crimes to be free on recognizance pending sentencing or appeal.<sup>187</sup>

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<sup>184</sup>Act of Apr. 9, 1979, Pub. L. No. 295, 1979 Ind. Acts 1486 (codified at IND. CODE § 35-23-4.1-18 (Supp. 1979)).

<sup>185</sup>Act of Apr. 11, 1979, Pub. L. No. 305, 1979 Ind. Acts 1513 (codified at IND. CODE § 35-50-2-2 (Supp. 1979)).

<sup>186</sup>Act of Apr. 2, 1979, Pub. L. No. 119, 1979 Ind. Acts 486 (codified at IND. CODE § 11-1-1-9.1 (Supp. 1979)). Prior to enactment of the Penal Code, persons convicted of murder or of several other crimes were sentenced to terms of life imprisonment. They were never subject to release on parole unless granted clemency by the governor. IND. CONST. art. 5, § 17. All persons sentenced under the Penal Code receive determinate sentences, except for those sentenced to death. IND. CODE §§ 35-50-2-3 to -3-4 (Supp. 1979). All persons sentenced to indeterminate sentences under the pre-Penal Code law are eligible for release on parole after serving the minimum term. *Id.* § 11-1-1-9.1 (Supp. 1978) (amended 1979). Persons sentenced under pre-Penal Code law to determinate sentences are eligible for parole upon serving half of the determinate term or 20 years, whichever occurs first. *Id.* This left only the persons serving life sentences without automatic eligibility for parole consideration. The statute passed in 1979 remedied the situation by allowing parole consideration for any person serving a life sentence after 20 years of imprisonment if the sentence was for murder, or after 15 years of imprisonment if the sentence was for any other crime. This provision does not apply to any person serving more than one life sentence. *Id.* § 11-1-1-9.1 (Supp. 1979). While persons sentenced under the Penal Code are subject to parole supervision upon release, *id.* § 35-50-6-1(b), they are automatically released without consideration by a parole board or other similar authority upon serving the sentence less the credit time earned. *Id.* § 35-50-6-1(a).

<sup>187</sup>Act of Apr. 9, 1979, Pub. L. No. 292, 1979 Ind. Acts 1485 (codified at IND. CODE §§ 35-4-6-1.5, -2.5 (Supp. 1979)); Act of Apr. 4, 1979, Pub. L. No. 293, 1979 Ind. Acts 1485 (codified at IND. CODE § 35-4.1-4-2 (Supp. 1979)). Indiana decisions have consistently held that there is no constitutional right to bail for a person convicted of an offense. *Iles v. Ellis*, 264 F. Supp. 185 (S.D. Ind. 1967); *Scruggs v. State*, 161 Ind. App. 672, 680, 317 N.E.2d 800, 806 (1974); *In re Pisello*, 155 Ind. App. 484, 490, 293 N.E.2d 228, 230 (1973) (citing *United States v. Motlow*, 10 F.2d 657 (7th Cir. 1926)); *Ex parte Pettiford*, 97 Ind. App. 703, 703, 167 N.E. 154, 154 (1929). *See generally* Annot., 45 A.L.R. 458 (1926). The legislature has the authority to limit trial court discretion in setting appeal bonds: "Since bail pending appeal is a right only if granted by the legislature, . . . the denial of bail . . . pending appeal is a denial of constitutional rights only if it is the result of an unreasonable classification constituting an invidious discrimination under the Fourteenth Amendment to the United States Constitution." *In re Pisello*, 155 Ind. App. at 490, 293 N.E.2d at 231. Pub. L. No. 292 allows trial courts to set appeal bonds at their discretion except when the conviction was for a Class A felony or for a non-suspendible offense under IND. CODE § 35-50-2-2 (Supp. 1979). Prior law, *id.* § 35-4-6-1 (1976) (repealed 1979), prohibited appeal bonds only for those sentenced to die or to serve life terms and to persons under 18 whose commitment was to a penal institution other than the Indiana Reformatory at Pendleton. The new statute specifically applies to persons convicted but not yet sentenced and to those sentenced persons who have



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appealed or plan to appeal their convictions. Pub. L. No. 293 refers only to the period between conviction and sentencing; it requires the imprisonment, pending sentencing, of persons who were not jailed before trial if the conviction was for a "felony against the person under IC 35-42 which is also specified under IC 35-50-2-2." Act of Apr. 4, 1979, Pub. L. No. 293, 1979 Ind. Acts 1485 (codified at IND. CODE § 35-4.1-4-2 (Supp. 1979)). At first glance, this second statute is unnecessary because Pub. L. No. 292 bars release on appeal bond of all persons convicted of nonsuspendible offenses, while Pub. L. No. 293 covers only some nonsuspendible crimes. What Pub. L. No. 293 adds to the other law is a requirement of imprisonment of convicted persons who could remain out of jail until the date of sentencing, without having received appeal bonds. These would be persons who had no bond set for them before trial and persons whose pre-trial bond might, in the absence of this statute, be considered by the court as continuing in effect until sentencing. Because nothing denominated "appeal bond" would have been issued for these convicted defendants, the restrictions on appeal bonds in Pub. L. No. 292 would be inapplicable to these persons.