VI. Criminal Law and Procedure

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A. Death Penalty

In *Judy v. State*,[1] the supreme court conducted its initial review,[2] unfortunately in a non-adversarial context,[3] of the present Indiana death penalty statute.[4] The *Judy* case reached the supreme court by the infrequently used route of the defendant's petition to determine the status of his appeal filed by the defendant's court-appointed counsel.[5] The defendant had sought to discharge his counsel, waive his right to appeal, and essentially terminate the appeal process.[6] His counsel recognized the professional ethics dilemma posed by the conflict between their duty to comply with a voluntary, knowing, and intelligently made request of a client, and their duty as court-appointed counsel to give effect to Indiana Code section 35-50-2-9(h), which requires review by the supreme court of the imposition of every death sentence.[7]

The court determined, on the basis of the record and a hearing before the court at which the defendant appeared, that the defendant could and did intelligently, knowingly and voluntarily waive his right to appeal his four murder convictions but that Indiana Code section 35-50-2-9(h) precluded the defendant from waiving a review of the death penalty sentence itself.[8] The court's ensuing review of the defendant's death sentencing thus proceeded with the defendant's counsel being "released from any further obligation with regard to the review"[9] and without their "filing of any brief concerning the Court's review of the death sentence."[10]

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[1] 416 N.E.2d 95 (Ind. 1981).

[2] *Id.* at 105.

[3] *Id.* at 111 (Prentice, J., concurring in result). *See also* Brewer v. State, 417 N.E.2d 889, 895 (Ind. 1981).

[4] IND. CODE § 35-50-2-9 (Supp. 1981).

[5] 416 N.E.2d at 96.

[6] *Id.* at 96, 101. This finding appears reconcilable with the defendant's oral declaration at his waiver hearing before the supreme court that "I feel that it's my right that I can proceed with the appeal." *Id.* at 101.

[7] *Id.* at 96-97.

[8] *Id.* at 97, 101-02.

[9] *Id.* at 101.

[10] *Id.*

With the case in this posture, the court examined the sentencing of the defendant in light of recent United States Supreme Court decisions,[11] the Indiana Constitution,[12] and the relevant Indiana statutes.[13] Both the death sentencing procedures themselves and their application in the particular case at bar were found to be unexceptionable.[14] The statutory sentencing procedures were "consistent and in full compliance with those required by the United States Supreme Court in *Gregg v. Georgia* and *Profitt v. Florida*, and thus not violative of the eighth and fourteenth amendments to the United States Constitution."[15] The sentence of death imposed in the *Judy* case was "not manifestly unreasonable" in that a " 'reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed.' "[16]

At trial, the defendant had been convicted of the murder of Terry Chasteen by virtue of evidence showing that he had killed Ms. Chasteen while committing or attempting to commit rape.[17] He had also been convicted of the murders of Misty Zollers, Stephen Chasteen, and Mark Chasteen through evidence showing that his killings of the children were knowing or intentional.[18] The jury recommended the death penalty for each conviction in accordance with the detailed standards imposed by Indiana Code section 35-50-2-9.[19] The jury and court found beyond a reasonable doubt that two aggravating circumstances existed and that no outweighing mitigating circumstances existed.[20] One aggravating circumstance was found to be the intentional killing of Terry Chasteen while committing or attempting to commit rape, and the second was found to be the commission by the defendant of " 'another murder, at any time, regardless of whether he [had] been convicted of that other murder.' "[21]

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[11]*E.g.*, Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976). *See also* Woodson v. North Carolina, 428 U.S. 280 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

[12]416 N.E.2d at 105 (discussing IND. CONST. art. 1, § 18).

[13]IND. CODE § 35-42-1-1 (Supp. 1981) (defining the crime of murder); *id.* § 35-50-2-3 (providing the sentencing alternatives for the crime of murder); *id.* § 35-50-2-9 (providing the substantive standards and procedural steps to be followed in imposing the death sentence).

[14]416 N.E.2d at 108.

[15]*Id.*

[16]*Id.* at 107, 108 (quoting IND. R. APP. REV. SENT. 2).

[17]*Id.* at 102 (quoting IND. CODE § 35-42-1-1(2) (Supp. 1981)).

[18]416 N.E.2d at 102 (quoting IND. CODE § 35-42-1-1(1) (Supp. 1981)).

[19]416 N.E.2d at 108-09.

[20]*Id.* at 109, 110.

[21]*Id.* at 109 (quoting IND. CODE § 35-50-2-9(b)(8) (Supp. 1981)). Thus, as opposed to the statutorily provided aggravating circumstances such as those referring to the killing of certain classes of victims or to the prison status of the defendant at the time of the killing, the aggravating circumstances in the *Judy* case were largely provided

That neither the jury nor the trial judge detected any outweighing mitigating circumstances, which may include "any . . . circumstances appropriate for consideration,"[22] was perhaps facilitated by the defendant's order to his trial attorneys not to present any such evidence.[23] The defendant's contribution to his sentencing hearing featured his assertion that "he would kill again if he had an opportunity, and some of the people he might kill in the future might be members of the jury."[24] While the search for mitigating circumstances was conscientiously performed, in view of the defendant's approach, one might well conclude that the *Judy* case death sentence may have reflected not so much the righteous vindication of community mores,[25] nor community retribution,[26] but the conceded personality disorder of the defendant[27] and his determination to unilaterally impose his own sentence.[28]

The major determinations made by the supreme court in *Judy* were reconsidered in an adversarial context and reaffirmed in *Brewer v. State*.[29] *Brewer* became the first case upholding the imposition of a death sentence under the current statute on a theory of accessory liability. In this case, the victim was shot and killed in his home by one of two perpetrators in the course of the commission of a robbery. The defendant was determined to be one of the two parti-

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simply by combining the elements of the two Indiana Code sections under which the defendant was convicted.

The possibility of a defendant being sentenced to death essentially in view of a finding that he "has committed another murder, at any time, regardless of whether he has been convicted of that other murder" would appear to pose rather severe double jeopardy and due process problems. *See generally* State v. McCormick, 397 N.E.2d 276 (Ind. 1979).

[22]IND. CODE § 35-50-2-9(c)(7) (Supp. 1981).

[23]416 N.E.2d at 100.

[24]*Id.*

[25]*See, e.g.*, W. BERNS, FOR CAPITAL PUNISHMENT (1979); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975).

[26]*See* 416 N.E.2d at 113 (DeBruler, J., dissenting). *See also* K. MENNINGER, THE CRIME OF PUNISHMENT (1969).

[27]The two court-appointed psychiatrists characterized the defendant as legally sane at the time of the crime, but as manifesting an "antisocial personality disorder." 416 N.E.2d at 100.

[28]There is, in view of the defendant's rejection of the appeal process, a certain irony in the trial court's finding that "Judy has consistently refused to accept responsibility for his various criminal acts, and has shifted the blame and responsibility to others for acts which were solely his own doing." *Id.* at 110. Whether Judy's courtroom declarations can be characterized as "intelligent" or not, the necessity of the trial court's relying upon them at crucial junctures is regrettable. *Id.* at 100, 109-10 ("Judy ordered his attorneys *not* to present any evidence of mitigating circumstances . . . . ") ("Judy personally advised the jury that no . . . mitigating factors were available for their consideration.").

[29]417 N.E.2d 889 (Ind. 1981).

cipants in the robbery. His murder conviction was upheld on appeal on the view that "an offense is committed whenever one intentionally or knowingly aids, induces or causes that offense to be committed"[30] and that "concerted action or participation in a crime"[31] is sufficient in this respect.

Among the issues raised on appeal by the defendant, probably the most significant was whether inflicting the death penalty on an accessory, as opposed to a principal,[32] contravened the constitutional proscription of cruel and unusual punishment in light of *Lockett v. Ohio*.[33] The court found that *Lockett* required not that death sentences in felony murder cases be restricted to the actual "triggerman," but that the death penalty be imposed only in light of a consideration of relevant mitigating factors such as the defendant's age and relative culpability.[34] Although the Ohio death penalty statute struck down in *Lockett* was vulnerable in this respect, the current Indiana statute was determined in *Brewer* to meet the *Lockett* requirement.[35] The court then concluded, crucially, that Indiana has historically imposed the death sentence on accessories to intentional and felony murders, that accessories are guilty of the same crime as their principal, and that imposition of the death sentence under the circumstances of this case was within the contemplation of the legislature.[36] The court focused on the availability to defendants as a mitigating consideration, which may or may not be outweighed by the aggravating circumstances in a given case,[37] that "the defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor."[38]

Thus, the majority was able to approve the trial court's finding of the requisite aggravating circumstances—intentional killing by the defendant while committing or attempting to commit robbery[39]—in the absence of a specific trial court determination that the defendant intentionally, as opposed to knowingly, killed anyone.[40] Whether the sentencing judge determined independently

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[30]*Id.* at 893.

[31]*Id.*

[32]Brewer's co-defendant and accomplice drew a sentence of sixty years imprisonment at a separate sentencing conducted by a different judge. *Id.* at 909.

[33]438 U.S. 586 (1978).

[34]417 N.E.2d at 903-04.

[35]*Id.* at 904 (citing IND. CODE § 35-50-2-9 (Supp. 1981)).

[36]*Id.*

[37]Thus it is apparently possible in Indiana for one's participation in a crime to be "relatively minor" and yet merit the death penalty.

[38]417 N.E.2d at 904 (citing IND CODE § 35-50-2-9(c)(4) (Supp. 1981)).

[39]*See* IND. CODE § 35-50-2-9(b)(1) (Supp. 1981).

[40]417 N.E.2d at 910-11 (DeBruler, J., dissenting).

of any jury finding that the defendant had intentionally killed the victim was somewhat clouded by his statement of his perceived "duty" to follow a "lawful and proper" sentence recommendation of the jury.[41] Justice DeBruler argued plausibly in dissent that "in light of the irrevocable nature of the penalty involved, the Legislature should make its purpose clear, if it be that persons having no actual conscious purpose of producing death are to be executed."[42]

B. Plea Bargain Agreements and "Shock Probation"

In *State ex rel. Goldsmith v. Marion County Superior Court*,[43] the Indiana Supreme Court held a trial court judge in contempt when the judge used Indiana's modification and review statute[44] to "circumvent" the court's order to either accept a tendered plea agreement or set the case for trial. The supreme court issued the mandate when the trial judge accepted a plea agreement for executed sentences in two criminal cases and then reduced each defendant's sentence. Pursuant to Indiana Code section 35-5-6-2,[45] the supreme court issued its writ of mandamus which the judge complied with by resentencing the defendants according to their plea agreements. When the judge granted the defendants' motions for shock probation several months later, the supreme court found him guilty of contempt.

Indiana's modification and review, or "shock probation," statute grants a court broad discretion to reduce or suspend a sentence

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[41]*Id.* at 910. Actually, IND. CODE § 35-50-2-9(e)(2) (Supp. 1981) indicates in relevant part that "[t]he court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

[42]417 N.E.2d at 912. The supreme court in *Brewer* disposed of two additional interesting issues on appeal. The court held that the state's noncompliance with Indiana Code section 35-50-2-9(a) requiring that the aggravating circumstances charged be listed on a separate page of the charging instrument did not prejudice the substantial rights of the defendant since no premature revelation to the jury of the defendant's prior criminal record could have accrued and it was impossible to segregate robbery from murder evidence against the defendant. 417 N.E.2d at 905-06.

Finally, the court held that the trial court's answering the jury's inquiry during its sentencing deliberations as to the defendant's potential eligibility for parole was not error, even though arguments and instructions tempting the jury to consider the probable time likely to be actually served are generally disfavored. *Id.* at 908. The defendant's guilt had been determined. "Given the task of the jury at this stage of the hearing, it is altogether proper that they be fully aware of the consequences of a prison sentence as well as of the consequences of a death sentence." *Id.* at 909.

[43]419 N.E.2d 109 (Ind. 1981).

[44]IND. CODE § 35-4.1-4-18 (Supp. 1981).

[45]"If the court accepts a recommendation, it shall be bound by its terms." IND. CODE § 35-5-6-2(b) (1976).

within one hundred eighty days after its imposition.[46] The policy generally embodied in such statutes is that the trial court should have the discretion to grant probation after the defendant has been "shocked" into becoming a law-abiding citizen by a short period of incarceration.[47] It is argued further that local trial courts are more familiar with defendants and their promise of rehabilitation than are corrections personnel.[48] The *Goldsmith* court avoided any discussion of the merits of shock probation and determined that "a plea bargain calling for an executed sentence forecloses any probation by the court, including shock probation."[49]

The court based its decision upon the importance of adherence to an explicit agreement between the prosecutor and the defendant. Arguing that such adherence is necessary to "facilitate expeditious disposition of criminal cases,"[50] the court stated that a plea bargaining agreement may be modified by shock probation only if no term of sentence is specified in the agreement or if the parties specifically provide for shock probation.[51]

Ironically, the supreme court's ruling may slow the judicial process by forcing judges to set more cases for trial if defendants believe that agreements under *Goldsmith* will be less favorable than they formerly were. In addition, judges may be less likely to accept tendered agreements in order to preserve their option of granting shock probation.

In dissent, Justice DeBruler forcefully argued that there was nothing in the statute, the plea agreement, or the supreme court's order which withdrew the judge's authority to grant shock probation.[52] Contending that the prosecutor was bound by the terms of his contract, the dissent determined that the judge complied with the agreement and the court's order when he resentenced the defendants following the order.[53] The majority obviously viewed the judge's actions differently: "These courts are not blind to subterfuge and manipulation intended to circumvent their orders. The light penalties imposed in recent cases should not be taken as precedent

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[46]The only statutory limitation imposed is that a judge may not suspend a sentence for a felony unless suspension is permitted under Indiana Code section 35-50-2-2. IND. CODE § 35-4.1-4-18 (Supp. 1981).

[47]Vito & Allen, *Shock Probation in Ohio: Use of Base Expectancy Rates as an Evaluation Method*, 7 CRIM. JUST. & BEHAVIOR 331, 331-32 (1980).

[48]Ammer, *Shock Probation in Ohio—A New Concept in Corrections after Seven Years in the Courts*, 3 CAP. U. L. REV. 33, 36 (1974).

[49]419 N.E.2d at 114.

[50]*Id.*

[51]*Id.*

[52]*Id.* at 115 (DeBruler, J., dissenting).

[53]*Id.*

for the future."[54] The judge's actions were deemed sufficient to support not only a contempt citation but a restrictive interpretation of the shock probation statute as well.

C. "Allen *Charges*"

Two court of appeals cases decided during the survey period[55] addressed the propriety of supplemental charges given to a deadlocked jury. In *Lewis v. State*,[56] a jury requested further instructions after several hours of deliberation on the defendant's burglary charge. The trial judge delivered a so-called "*Allen* Charge"[57] which stressed the importance of reaching a decision,[58] and twenty minutes later the jury found the defendant guilty. The fourth district of the court of appeals determined that the use of the instruction constitutes reversible error in that it "compels the jury to reach a verdict when it might otherwise not do so and thus denies the parties a fair trial."[59] As an alternative, the court adopted a procedure mandated by a United States Court of Appeals case[60] which provides for a neutral supplemental charge that may be repeated only if it was given before the jury retired.

In *Burnett v. State*,[61] the first district of the court of appeals examined a virtually identical[62] supplemental charge in a trial for battery. The court noted no substantial difference in the content of the charge recommended by the fourth district when it was compared with the instruction under examination. In addition, the court questioned the reasoning behind the requirement that the charge must be given before the jury retires if it is to be given as a supplemental instruction.[63]

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[54]*Id.* at 114.

[55]Burnett v. State, 419 N.E.2d 172 (Ind. Ct. App. 1981); Lewis v. State, 409 N.E.2d 1276 (Ind. Ct. App. 1980), *vacated and remanded*, 424 N.E.2d 107 (Ind. 1981).

[56]409 N.E.2d 1276 (Ind. Ct. App. 1980).

[57]The charge is named after the case which first considered its propriety. Allen v. United States, 164 U.S. 492 (1896).

[58]An earlier case, Guffey v. State, 386 N.E.2d 692 (Ind. Ct. App. 1979) criticized the following language in particular: "There is no reason to believe that the case can be tried again any better or more exhaustively than it has been. There is no reason to believe that more evidence or clearer evidence would be produced on behalf of either side." Lewis v. State, 409 N.E.2d at 1276. The *Guffey* court upheld the use of such language but stated that such an instruction "approaches commenting on the evidence and the conduct of the trial and we do not recommend its use." 386 N.E.2d at 698.

[59]409 N.E.2d at 1277.

[60]United States v. Silvern, 484 F.2d 879 (7th Cir. 1973).

[61]419 N.E.2d 172 (Ind. Ct. App. 1981), *vacated*, No. 1081 S 307 (Ind. Oct. 27, 1981).

[62]The instruction did not contain the second sentence of a paragraph criticized in an earlier case. *See* note 58 *supra.*

[63]419 N.E.2d at 173.

In a recent decision,[64] the Indiana Supreme Court granted transfer on the *Lewis* case and agreed with the lower court's reversal and remand for a new trial.[65] However, the supreme court clarified the procedure questioned in the *Burnett* opinion: the more neutral charge adopted by the *Lewis* court should be included in all pre-deliberation instructions and if the jury becomes deadlocked, the judge must "reread *all* instructions given to them prior to their deliberations, without emphasis on any of them and without further comment."[66]

D. The Insanity Defense and Psychiatric Testimony

In *McCall v. State*,[67] the state claimed that the defendant was properly barred from presenting expert testimony on his insanity because he refused to cooperate with court-appointed psychiatrists. Although the Indiana Code[68] requires the appointment of two psychiatrists for examination of a defendant who raises the insanity defense, the court determined that this widely-recommended[69] sanction for failure to cooperate would "cut out the heart of a legally acceptable defense."[70]

The court emphasized that the defendant's alleged insanity could have been the cause of his failure to cooperate with examining psychiatrists. Noting that this was a question of fact, the court determined that evidence of a defendant's refusal of examination should be submitted to the jury for consideration on the insanity issue.[71]

The dissent argued vehemently in favor of penalizing the defendant for his lack of cooperation, noting that the defendant specifically violated the legislature's provisions for presenting the issue

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[64]Lewis v. State, 424 N.E.2d 107 (Ind. 1981).

[65]*Id.* at 112.

[66]*Id.* at 111 (emphasis added).

[67]408 N.E.2d 1218 (Ind. 1980).

[68]IND. CODE § 35-5-2-2 (Supp. 1981).

[69]*See, e.g.*, Karstetter v. Cardwell, 526 F.2d 1144 (9th Cir. 1975); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), *vacated and remanded on other grounds*, 392 U.S. 651 (1968); State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965); Lee v. County Court, 27 N.Y.2d 432, 318 N.Y.S.2d 705, 267 N.E.2d 452, *cert. denied*, 404 U.S. 823 (1971); State v. Myers, 220 S.C. 309, 67 S.E.2d 506 (1951).

[70]408 N.E.2d at 1220. In emphasizing the importance of the insanity defense, *id.* at 1220-21, the court came dangerously close to a claim that sanity is an element of criminal intent which the prosecution is required to prove. This argument was recently rejected in a case involving an attack on the constitutionality of placing the burden of proof on the defendant as to the insanity defense. Price v. State, 412 N.E.2d 783 (Ind. 1980).

[71]408 N.E.2d at 1221.

of insanity to a jury.[72] "The majority opinion allows a defendant to call on the plea of insanity, refuse to cooperate with the court-appointed expert witnesses, and then 'have his cake and eat it too,' by calling his witnesses, who will testify that he was insane when he committed the crime."[73]

The majority may have been persuaded by the fact that the court-appointed psychiatrists had previously examined the defendant and were able to testify as to his sanity based on the prior examinations.[74] Nevertheless, the opinion does not indicate that the decision is limited to the facts before the court. The result appears to be that a defendant may avail himself of the insanity defense, present expert testimony as to his insanity, and thwart the prosecution's ability to rebut that testimony by refusing to cooperate with court-appointed psychiatrists.

E. Lesser Included Offenses and Double Jeopardy

Two recent decisions from the Indiana Court of Appeals[75] differed in their interpretation of Indiana's statutory definition of "included offenses."[76] The newly enacted statute, section 35-41-1-2, provides that an included offense is an offense that:

> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or
> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.[77]

The dispute as to the meaning of the statute arose in the context of a defendant's conviction for an offense other than the crime for which he was charged.[78]

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[72]*Id.* at 1224 (Pivarnik, J., dissenting).

[73]*Id.*

[74]*Id.* at 1219. Another factor which influenced the court's decision was its determination that the defendant's witness was not an expert for purposes of the proposed sanction. *See* Karlson, *Evidence, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 227, 242 (1981).

[75]Murphy v. State, 414 N.E.2d 322 (Ind. Ct. App. 1980); Lewis v. State, 413 N.E.2d 1049 (Ind. Ct. App. 1980).

[76]IND. CODE § 35-41-1-2 (1976 & Supp. 1981).

[77]*Id.*

[78]The issue is one of notice to the defendant. Due process requires that a defendant receive sufficient notice of the crime for which he is charged so that he can ad-

In *Lewis v. State*,[79] the trial court granted the defendant's motion for a directed verdict in regard to a charge of forgery but found the defendant guilty of attempted theft. The defendant appealed, arguing that the crime of attempted theft was not an included offense of the charged crime of forgery. The court agreed with the defendant's argument and reversed the conviction.[80]

The court applied the "two-pronged test" of *McGairk v. State*[81] in defining what constitutes an included offense under Indiana Code section 35-41-1-2. In *McGairk*, the first district court of appeals determined that an included offense is defined by two of the three factors set out in the statute:

> First, there must be a determination of the material elements involved. These can be either the same elements or less than those required for the offense charged. The second determination is whether the lesser offense consists of an attempt to commit the offense charged *or* whether the lesser offense differs from that charged only in respect to some less serious harm or risk of harm, or whether a lesser culpability is required for the commission of the lesser offense.[82]

The fourth district *Lewis* court held that neither part of the *McGairk* test was satisfied when the offense of attempted theft was compared with the forgery charge.[83] The court noted that the crime of theft requires proof of two additional elements not present in the definition of forgery[84] and that attempted theft does not involve less harm, risk of harm, or culpability than does forgery. Therefore, the information was insufficient to give adequate notice of the crime for which the defendant was convicted.[85]

In *Murphy v. State*,[86] the second district of the court of appeals refused to apply the *McGairk* test. Judge Sullivan noted that the *McGairk* language was dicta and wrote, "We disagree with that in-

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equately prepare his defense. IND. CONST. art. 1, § 13; Blackburn v. State, 260 Ind. 5, 291 N.E.2d 686 (1973). If the charging instrument or indictment provides the defendant with adequate notice of the charged offense it is deemed to have provided notice of lesser included crimes as well. McGairk v. State, 399 N.E.2d 408 (Ind. Ct. App. 1980).

[79]413 N.E.2d 1069 (Ind. Ct. App. 1980).

[80]*Id.* at 1072.

[81]399 N.E.2d 408 (Ind. Ct. App. 1980).

[82]*Id.* at 411.

[83]413 N.E.2d at 1071-72.

[84]Theft requires knowing or intentional unauthorized control over another's property and intent to deprive that person of the value or use of his property. Neither requirement is an element of a forgery charge. *Compare* IND. CODE § 35-43-4-2 (Supp. 1981) *with id.* § 35-43-5-2.

[85]413 N.E.2d at 1072.

[86]414 N.E.2d 322 (Ind. Ct. App. 1980).

terpretation and conclude that the statute defines an 'included offense' as any one of the three subdivisions standing alone."[87] The court determined that because an attempt was statutorily defined as an included offense in the second subdivision of the statute, the trial court did not commit per se error in instructing the jury on attempted burglary when the defendant was charged and tried for burglary.[88]

The court in *Lewis* merely adopted the test set out in *McGairk*. Neither court cited authority for the "two-pronged" interpretation. The *Murphy* court based its interpretation of section 35-41-1-2 on standard drafting guidelines, the legislature's use of the disjunctive conjunction "or," and a comparison of other definitions set forth in the statute.[89] The *Murphy* test is further supported by a comment to the annotated version of section 35-41-5-1[90] and appears, at first blush, to be the more reasonable approach.

This split of opinion in the court of appeals produces broader implications than the facts of the *Murphy* and *Lewis* cases suggest.[91] Because the ultimate question is whether the defendant is sufficiently apprised of the charge against him,[92] the propriety of the *Murphy* test is questionable. For example, it is doubtful that a defendant would have notice of an offense which merely satisfies the statute's third requirement of less serious harm, risk of harm, or culpability. Alternatively, by determining that the first subdivision's requirement of matching elements must be met in every case, the *McGairk-Lewis* test assures that the charging instrument or indictment will provide the defendant with notice adequate to prepare his defense.

In *State v. Tharp*,[93] the Indiana Court of Appeals addressed the

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[87]*Id.* at 324. The court added in a footnote that reference to other subdivisions of the statute is necessary only under the provision of the second subdivision that an included offense consists of an " 'attempt to commit the offense charged *or* [an attempt to commit] an offense *otherwise included* therein.' An offense 'otherwise included' is obviously one which complies with either subsection '1' or '3'." *Id.* n.3 (quoting IND. CODE § 35-41-1-2 (Supp. 1981)) (emphasis and language added by the court).

[88]*Id.* at 324-25. The court further determined that there was sufficient evidence from which the jury could find the defendant guilty of the attempt and that the instruction was therefore proper. *Id.* at 326.

[89]*Id.* at 324-25 (citing THE DRAFTING MANUAL FOR THE INDIANA GENERAL ASSEMBLY 902, 904 (1976)).

[90]"It should also be noted that § 35-41-1-2 of the Penal Code defines attempt as an 'included offense' of the consummated crime." IND. CODE ANN. § 35-41-5-1, Commentary (West 1978).

[91]The *Murphy* case may well have had the same result had the court applied the *McGairk* test. Because an attempt merely requires a substantial step toward commission of the underlying crime (coupled with the culpability required for that crime), the "material elements" prong of the *McGairk* test probably would have been satisfied. *See* IND. CODE § 35-41-5-1 (Supp. 1981).

[92]*See* note 78 *supra.*

[93]406 N.E.2d 1242 (Ind. Ct. App. 1980).

issue of whether the state may prosecute two defendants for conspiracy after prosecution for the underlying offense is barred by the "speedy trial" rule.[94] The state argued that although the defendants were not brought to trial on theft charges within the one year prescribed by the rule,[95] prosecution for conspiracy to commit theft was not barred by double jeopardy principles.

The court rejected the double jeopardy analysis and relied instead on the case of *Pillars v. State*.[96] In *Pillars*, the court of appeals held that a speedy trial dismissal of assault with intent to kill barred the later charges of threatening to use a deadly weapon and aiming a weapon.[97] The *Tharp* court cited *Pillars* for the proposition that

> the State may not, subsequent to a criminal charge becoming time-barred . . . subject the defendant to a related charge, although not strictly an included offense, growing out of the same transaction, incident, events, or set of facts, which facts or events had occurred and were known or, in the exercise of due diligence, should have been known to the State, and which related charge could have been joined with the initial charge . . . .[98]

The court noted that the conspiracy charge could have been joined with the charge of theft[99] and therefore held that the conspiracy charge was time-barred as well.[100]

The court's reasoning is unconvincing. After noting that the case before it did not present a double jeopardy problem, the court cited an Ohio double jeopardy opinion in support of its decision and stated that "[w]e are convinced that these observations of the Supreme Court of Ohio are as applicable to the situation before us as they were to the double jeopardy problem addressed by that court."[101] In so doing, the court ignored the test for double jeopardy set out by the Indiana Supreme Court in *Elmore v. State*.[102] The test employed in *Elmore*, whether each offense "requires proof of an additional fact

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[94]"No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge . . . is filed, or from the date of his arrest . . . , whichever is later . . . ." IND. R. CRIM. P. 4(C).

[95]*Id.*

[96]390 N.E.2d 679 (Ind. Ct. App. 1979).

[97]*Id.* at 684.

[98]406 N.E.2d at 1246.

[99]*Id.* n.6.

[100]*Id.* at 1246.

[101]*Id.*

[102]382 N.E.2d 893 (Ind. 1978).

which the other does not,"[103] resulted in that court's decision that the offenses of theft and conspiracy to commit theft are not the same for purposes of double jeopardy.[104]

The court in *Tharp* relied upon *Pillars* because *Pillars* presented a similar speedy trial problem. However, the *Tharp* language is broader than *Pillars* would dictate. Although the *Pillars* decision has been criticized for ignoring the double jeopardy test and for focusing on the fact that all the offenses arose from the same facts,[105] the *Pillars* court did note that the lesser crimes of aiming and threatening to use a weapon were necessary elements of the time-barred charge.[106] The *Pillars* analysis thus focused on both the elements of the offenses involved and on the fact that the same harm arose from the same act. Nowhere in that opinion is the "message clear"[107] that any crime which could have been statutorily joined with the discharged offense is similarly barred.

F. Collateral Estoppel and the Habitual Offender Law

In *Hall v. State*,[108] the Indiana Supreme Court held that a criminal defendant could not use the doctrine of collateral estoppel to prevent the prosecution's introduction of two prior convictions to establish habitual offender status.[109] The habitual offender charge against the defendant was based in part upon earlier convictions for burglary and escape.[110] An earlier court had also considered a habitual offender charge against the defendant in connection with a rape conviction and had dismissed the charge because the state failed to establish that the defendant had made knowing and voluntary guilty

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[103]*Id.* at 895 (quoting Blockburger v. United States, 284 U.S. 299 (1932)).

[104]*Id.* at 898. The relationship between double jeopardy principles and the issue before the *Tharp* court is not as tenuous as the court suggests. Although it is true that a speedy trial discharge does not constitute an acquittal, it has been held that such a discharge is a bar to further prosecution of the charge in much the same way an acquittal operates to bar further prosecution in a double jeopardy setting. *See* Small v. State, 259 Ind. 349, 287 N.E.2d 334 (1972); State *ex rel.* Hasch v. Johnson Circuit Court, 234 Ind. 429, 127 N.E.2d 600 (1955). It was this reasoning which supported a decision that the time-barred discharge of an offense is effective to bar all lesser included offenses as well. 259 Ind. at 352-53, 287 N.E.2d at 336.

[105]*See* Raphael & Steinberg, *Criminal Law and Procedure, 1980 Survey of Recent Developments in Indiana Law*, 14 IND. L. REV. 257, 270 (1981).

[106]390 N.E.2d at 684.

[107]*See* State v. Tharp, 406 N.E.2d at 1246.

[108]405 N.E.2d 530 (Ind. 1980).

[109]An individual may be sentenced as an habitual offender for any felony if he has accumulated two prior unrelated felony convictions. IND. CODE § 35-50-2-8 (Supp. 1981).

[110]Only one of these two convictions was actually necessary for the habitual offender charge because the defendant had secured a third conviction after those convictions but before the charges brought in this case. 405 N.E.2d at 536.

pleas to the burglary and escape charges. The defendant argued that this was a final determination of the validity of the two prior convictions.

The *Hall* court concluded that the trial court judge was correct in allowing the state to allege and present proof on the two felony convictions, even though the previous court had dismissed the earlier habitual offender count on the basis of invalidity, and stated:

> The action of the trial court at the previous habitual offender trial did not operate to "acquit" the defendant of the two prior felony convictions. Its action involved only the sentencing to be imposed upon the 1977 rape charge and a determination of defendant's status as an habitual offender based upon the evidence presented at the time.[111]

The court reasoned that the habitual offender charge was "based upon the *fact* of [the] two prior felony convictions"[112] and that although the defendant could have raised the convictions' asserted invalidity as a defense, he could not rely on the principles of collateral estoppel.

Problems with the case arise in connection with the finality rule; one of the necessary purposes of a trial is to establish the position between the litigants for all time. Here, an unappealed or unsuccessfully appealed decision of one court was re-opened by another court, with the result that the two tribunals reached inconsistent decisions. The question also arises whether the earlier court's ruling was in fact a determination of invalidity. The *Hall* court reasoned that the previous court was merely considering the sentencing to be imposed. That was, however, the precise issue before the court in the latter case.

The policy consideration involved in issue preclusion is harassment of the defendant by the prosecution. The *Hall* court decided that two of the convictions used to prove habitual offender status could be relitigated on the issue of validity. It allowed the state to bring in more evidence to prove validity, even though it had been unsuccessful in an earlier trial on the same point.

G. Standards of Care: Neglect of a Dependent and Criminal Recklessness

In *Smith v. State*,[113] the Indiana Court of Appeals reviewed the defendant's conviction for neglect of a dependent.[114] On February 19,

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[111] *Id.* at 536-37.

[112] *Id.* at 536.

[113] 408 N.E.2d 614 (Ind. Ct. App. 1980).

[114] IND. CODE § 35-46-1-4 (Supp. 1981).

1978, the defendant witnessed a brutal beating of her son which resulted in the four-year-old's death. The defendant did nothing to protect her son from the attacker, the defendant's boyfriend, and sought no medical treatment for him until several hours later. She was tried and convicted under Indiana Code section 35-46-1-4 which provides that "a person having the care, custody, or control of a dependent who knowingly or intentionally . . . places the dependent in a situation that may endanger his life or health . . . commits neglect of a dependent . . . ."[115] The conviction was attacked with the argument that the state failed to prove the requisite criminal intent and any acts proximately resulting in the young boy's death.

The court of appeals was unpersuaded. Citing to cases[116] decided prior to the enactment of the present statute, the court reasoned that a parent has an affirmative duty to care for his or her child. Therefore, the state need only prove that a "defendant parent was aware of facts that would alert a reasonable parent under the circumstances to take affirmative action to protect the child."[117] The court found that proof of actual knowledge or active participation on the defendant's part was not required under this "reasonable parent" standard.[118]

The court refused to apply the statutory definitions[119] of the words "knowingly" and "intentionally" which essentially provide for a subjective test of culpability. Setting forth an objective "reasonableness" test, Judge Neal wrote, "The words 'knowingly' or 'intentionally,' as contained in Ind. Code 35-46-1-4, can scarcely have their usual application in a situation, as here, . . . where the offense grows out of the nonperformance of an affirmative duty imposed by [case] law for the care and protection of a child."[120]

In *Williams v. State*,[121] the Indiana Court of Appeals held that driving while intoxicated and striking a bicyclist was sufficient to support a conviction of criminal recklessness under the 1977 Crim-

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[115]*Id.* The defendant's sentencing on this conviction was ultimately vacated because she was also convicted and sentenced for involuntary manslaughter under IND. CODE § 35-42-1-4 (Supp. 1981). Sentencing on both the involuntary manslaughter conviction and the necessarily included neglect charge was a violation of double jeopardy principles. 408 N.E.2d at 622.

[116]Eaglen v. State, 249 Ind. 144, 231 N.E.2d 147 (1967); Hunter v. State, 172 Ind. App. 397, 360 N.E.2d 588 (1977).

[117]408 N.E.2d at 621.

[118]*Id.* at 621-22.

[119]"Intentional" conduct requires a conscious objective, and "knowing" conduct requires that a person be aware of a high probability that he is engaged in such conduct. IND. CODE § 35-41-2-2(a), (b) (Supp. 1981).

[120]408 N.E.2d at 621.

[121]415 N.E.2d 118 (Ind. Ct. App. 1981).

inal Code.[122] The majority determined that because of changes made in the Criminal Code, prior case law[123] requiring proof of additional reckless conduct beyond proof of intoxication was no longer applicable. The court concluded that the defendant's intoxication constituted recklessness because it " 'involve[d] a substantial deviation from acceptable standards of conduct.' "[124]

The dissent sharply criticized the holding that intoxication is sufficient to constitute recklessness.[125] Commenting that the majority "seize[d] upon a distinction without substance,"[126] Judge Young argued that the new crime of criminal recklessness involves the same standard as did reckless homicide under the old code.[127] Therefore, the cases which established the proof necessry to show recklessness "serve as perfect guideposts for review of a conviction for recklessness."[128] This contention is supported by the Indiana Criminal Law Study Commission Comments which state that the reckless state of mind has been recognized in Indiana as an element in such crimes as reckless homicide and reckless driving.[129] The Commission further states that Indiana Code section 35-41-2-2(c), which defines the word "recklessly," does not alter the test for recklessness used by Indiana courts.[130]

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[122]Criminal recklessness is a new offense under the 1977 Code. IND. CODE § 35-42-2-2(b) (Supp. 1981). Recklessness is defined at *id.* § 35-41-2-2(c).

[123]DeVaney v. State, 259 Ind. 483, 496, 288 N.E.2d 732, 738 (1972); Broderick v. State, 249 Ind. 476, 231 N.E.2d 526 (1967); Johnson v. State, 164 Ind. App. 12, 19-20, 326 N.E.2d 637, 642-43 (1975). These cases involved interpretation of Indiana's reckless homicide statute. The new criminal recklessness statute is designed to encompass *"all the offenses committed by the reckless handling of motor vehicles except reckless homicide."* Williams v. State, 415 N.E.2d at 123 (quoting IND. CODE ANN. § 35-42-2-2, Indiana Criminal Law Study Commission Comments (West 1978)) (emphasis added by the court).

[124]415 N.E.2d at 123 (quoting IND. CODE § 35-41-2-2(c) (Supp. 1981)).

[125]415 N.E.2d at 123 (Young, P.J., dissenting).

[126]*Id.* at 124.

[127]*Id.* Judge Young recognized that the offenses essentially differ only in the degree of harm that must be proved.

[128]*Id.*

[129]IND. CODE ANN. § 35-41-2-2, Indiana Criminal Law Study Commission Comments (West 1978).

[130]*Id.*