

## VI. Criminal Law and Procedure

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Although it is commonly said that the law is a jealous mistress, she has been especially demanding of criminal law practitioners in the past ten years. In addition to the enormous amount of precedent created by the United States Supreme Court and by Indiana appellate courts during that period of time, the Indiana legislature has enacted a number of major code sections that directly affect the practice of criminal law. In 1973, the Indiana legislature passed a new code of criminal procedure.<sup>1</sup> In 1977, a new penal code that redefined all the major crimes in Indiana became effective.<sup>2</sup> In 1979, a new juvenile code became law.<sup>3</sup> In 1981, the majority of traffic offenses were decriminalized and the procedures for enforcing violations of traffic laws were "civilized."<sup>4</sup> This year, the legislature has again adopted a new criminal procedure code, the majority of which became effective on September 1, 1982.<sup>5</sup> Much of this new procedure code is simply a recodification or a renumbering of existing laws, with very few grammatical or technical changes. However, there are substantial changes in criminal procedure in many areas. This Survey Article will review both the legislative and judicial changes that have occurred in the past year, beginning with an analysis of the statutory changes that have been created by the enactment of the new criminal code.<sup>6</sup>

### A. Arrest

The article of the new procedure code concerning preliminary proceedings became effective on June 1, 1981.<sup>7</sup> Generally, the chapters in this article that concern arrest codified existing statutory and common law arrest powers of police officers. The article also codified the

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<sup>1</sup>Act of Apr. 23, 1973, Pub. L. No. 325, 1973 Ind. Acts 1750.

<sup>2</sup>Act of Apr. 12, 1977, Pub. L. No. 340, 1977 Ind. Acts 1533; Act of Feb. 25, 1976, Pub. L. No. 148, 1976 Ind. Acts 718.

<sup>3</sup>Act of Apr. 11, 1979, Pub. L. No. 276, 1979 Ind. Acts 1379; Act of Mar. 10, 1978, Pub. L. No. 136, 1978 Ind. Acts 1196.

<sup>4</sup>Act of Apr. 29, 1981, Pub. L. No. 108, 1981 Ind. Acts 1108.

<sup>5</sup>Act of Feb. 25, 1982, Pub. L. No. 204, 1982 Ind. Acts 1518; Act of May 5, 1981, Pub. L. No. 298, 1981 Ind. Acts 2314.

<sup>6</sup>Due to page constraints, not all provisions of the new procedure code are discussed in this Survey Article. Several changes, however, did occur in the statutes concerning venue (current version at IND. CODE §§ 35-32-2-1 to -5 (1982)), change of judge (current version at *id.* §§ 35-36-5-1 to -2), change of venue (current version at *id.* §§ 35-36-6-1 to -10), search and seizure (current version at *id.* §§ 35-33-5-1 to -7), and grand juries (current version at *id.* §§ 35-34-2-1 to -12).

<sup>7</sup>Act of May 5, 1981, Pub. L. No. 298, § 2, 1981 Ind. Acts 2314, 2317 (codified at IND. CODE §§ 35-33-1-1 to -11-10 (1982)).

uncertain and vague common law arrest powers of citizens. Additionally, the article makes it clear that an arrest warrant can only be issued after an indictment or information has been filed. If no criminal charge has been filed, a law enforcement officer may not obtain an arrest warrant simply by presenting probable cause to a judge, which would be sufficient to obtain a search warrant. The article includes a new section on the recall of arrest warrants when charges have been dismissed. The article also modifies existing law permitting issuance of a summons in lieu of a warrant, and adds a new section permitting a police officer to issue a summons and promise to appear in misdemeanor cases in lieu of making an arrest. In addition to the arrest chapters in this article of the new procedure code, many other statutes relating to the law of arrest remain in effect in Indiana and should be considered together with the new code. This portion of the Survey Article, therefore, discusses not only what was done by the new procedure code regarding arrest, but also what was not done.

In the new article concerning arrest, the first subsection simply states that "[a] law enforcement officer<sup>8</sup> may arrest a person when he has a warrant commanding that the person be arrested."<sup>9</sup> The warrant is directed to the sheriff in the county where the indictment or information is filed,<sup>10</sup> but arrests made pursuant to the warrant can be made by any Indiana law enforcement officer.<sup>11</sup> The legislature retained the statute that requires a police officer to inform the arrestee that the officer is acting under the authority of a warrant and to show the warrant.<sup>12</sup>

The next subsection simply codifies the common law principle that a law enforcement officer may make an arrest whenever he has probable cause to believe the person has committed or is attempting to commit a felony.<sup>13</sup> The term "probable cause" is not defined by the new code, but probable cause is commonly understood to mean facts and circumstances that are within the arresting officer's knowledge and of which he has reasonably trustworthy information that would

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<sup>8</sup>The Indiana Code defines the term "law enforcement officer" to include: "(1) a police officer, sheriff, constable, marshal, or prosecuting attorney; (2) a deputy of any of those persons; or (3) an investigator for a prosecuting attorney." IND. CODE § 35-41-1-2 (1982).

<sup>9</sup>IND. CODE § 35-33-1-1(1) (1982) (footnote added). The form of the warrant is set out in *id.* § 35-33-2-2.

<sup>10</sup>*Id.* § 35-33-2-2(a)(8).

<sup>11</sup>IND. CODE § 35-33-2-3 (1982). *See also id.* §§ 10-1-1-10 (state police powers), 14-3-4-9 (powers of conservation officers), 16-6-8.5-1(b)(2) (powers of designated employees of the Board of Pharmacy), 36-2-13-5(4) (sheriffs' powers), 36-5-7-4(5) (powers of town marshals), 36-8-3-6(a) (city police powers).

<sup>12</sup>*Id.* § 35-1-19-2. *Cf. Carlisle v. State*, 162 Ind. App. 396, 319 N.E.2d 651 (1974) (arrest warrant may be shown to arrested person when he arrives at jail).

<sup>13</sup>IND. CODE § 35-33-1-1(2) (1982).



justify a belief, by a man of reasonable caution, that an offense has been or is being committed by the person arrested.<sup>14</sup> As distinguished from a later subsection defining misdemeanor arrest powers, the felony arrest statute makes no "in the presence" of the arresting officer requirement, which is consistent with the common law.<sup>15</sup> The absence of this requirement allows felony arrests to be made upon credible hearsay.<sup>16</sup> Probable cause need not be confined to facts within the knowledge of the arresting officer alone, but also can be determined on the basis of the collective information known to the law enforcement organization as a whole.<sup>17</sup> Therefore, for example, a police officer can make an arrest based only on a police radio communication.<sup>18</sup>

Nothing in the new procedure code limits warrantless arrests by requiring that law enforcement officers must obtain an arrest warrant before making an arrest unless they can demonstrate exigent circumstances that would preclude them from doing so. Past Indiana decisions have conflicted over this requirement,<sup>19</sup> but the Indiana Supreme Court, following the lead of the United States Supreme Court,<sup>20</sup> has recently held that if the arrest is made in a public place, warrantless arrests need not be accompanied by exigent circumstances.<sup>21</sup> The new procedure code does not change these principles; however, it should be noted that each police agency has separate statutes conferring warrantless arrest powers upon that agency.<sup>22</sup>

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<sup>14</sup>See *Akins v. State*, 429 N.E.2d 232, 237 (Ind. 1981) (quoting *Pawloski v. State*, 269 Ind. 350, 352-53, 380 N.E.2d 1230, 1232 (1978)); *Lindley v. State*, 426 N.E.2d 398, 401 (Ind. 1981) (citing *Gaddis v. State*, 267 Ind. 100, 104, 368 N.E.2d 244, 247 (1977)); *Taylor v. State*, 406 N.E.2d 247, 249 (Ind. 1980). It is not the police officer's subjective belief in probable cause that is significant but whether the facts known to the officer show probable cause from an objective standpoint. *Grimes v. State*, 412 N.E.2d 75, 77 (Ind. 1980); *Hatcher v. State*, 410 N.E.2d 1187, 1189 (Ind. 1980). Thus, it does not matter that the police officer enunciates the improper legal theory for arrest, as long as probable cause to arrest for some offense exists. *Hatcher v. State*, 410 N.E.2d at 1189.

<sup>15</sup>See *Works v. State*, 266 Ind. 250, 362 N.E.2d 144 (1977).

<sup>16</sup>See *Holguin v. State*, 256 Ind. 371, 269 N.E.2d 159 (1971).

<sup>17</sup>See *Benton v. State*, 401 N.E.2d 697 (Ind. 1980); *Francis v. State*, 161 Ind. App. 371, 316 N.E.2d 416 (1974).

<sup>18</sup>See *Benton v. State*, 401 N.E.2d 697, 699 (Ind. 1980); *Francis v. State*, 161 Ind. App. 371, 373, 316 N.E.2d 416, 418 (1974).

<sup>19</sup>Compare *Smith v. State*, 397 N.E.2d 959 (Ind. 1979) and *Britt v. State*, 395 N.E.2d 859 (Ind. Ct. App. 1979) with *Gardner v. State*, 388 N.E.2d 513 (Ind. 1979).

<sup>20</sup>*United States v. Watson*, 423 U.S. 411 (1976).

<sup>21</sup>*Funk v. State*, 427 N.E.2d 1081 (Ind. 1981). However, a warrant will be required, absent exigent circumstances, to enter the private residence of an arrestee to make an arrest, *Payton v. New York*, 445 U.S. 573 (1980), and a search warrant will be required to enter the residence of a third party in order to effect an arrest. *Steagald v. United States*, 451 U.S. 204 (1981).

<sup>22</sup>*E.g.*, IND. CODE §§ 10-1-1-10 (state police), 14-3-4-9 (conservation officer), 16-6-8.5-1 (designee of Board of Pharmacy for controlled substances offenses) 36-2-13-5 (sheriff),

The next subsection permits a law enforcement officer to make an arrest if there is probable cause to believe that the person has failed to stop after a vehicular accident involving personal injury or property damage, or that the person has committed the offense of driving under the influence of alcohol.<sup>23</sup> Previously, the arrest powers for these offenses were found in the traffic laws.<sup>24</sup> Indeed, certain provisions in the present traffic laws seem to duplicate new arrest provisions enacted by the new procedure code.<sup>25</sup> The new procedure code clearly permits a law enforcement officer to arrest a suspect for driving under the influence of alcohol or for leaving the scene of the accident, even if the offense was not committed in the officer's presence.<sup>26</sup> Because both offenses are misdemeanors, an arrest could not be made unless the offenses were committed in the presence of the arresting officer were it not for this specific section of the procedure code.<sup>27</sup> The arrest procedures for other traffic offenses will be discussed later in this Survey Article.

The next subsection codifies the common law power of a police officer to make an arrest for a misdemeanor committed in his presence.<sup>28</sup> This raises the question of when an offense is committed "in the presence" of the arresting officer. Certainly, if an officer observes a crime, it is committed in his presence.<sup>29</sup> If an offense is detected by any of the officer's senses, such as hearing or smell, the offense is also generally considered to be committed in the officer's

36-8-3-6 (city police), 36-5-7-4 (town marshal), (1982). *See also id.* §§ 7.1-2-2-9 (Alcoholic Beverage Commission enforcement officers), 8-3-17-2 (railroad police), 8-3-18-3 (railroad conductors), 11-3-3-7 (parole officer), 36-7-20-3 (housing authority police).

<sup>23</sup>IND. CODE § 35-33-1-1(3) (1982). There is another statute that concerns arrests for driving under the influence of alcohol. The implied consent law provides that a law enforcement officer must offer a person the opportunity to submit to a chemical test before he can arrest the person for that offense. *Id.* § 9-4-4.5-3(a). Although the failure to offer the chemical test might affect the determination of whether a person could have his license suspended, it would not affect the validity of the arrest. *State v. Hummel*, 173 Ind. App. 170, 363 N.E.2d 227 (1977), *cert. denied*, 436 U.S. 905 (1978).

<sup>24</sup>*See* IND. CODE §§ 9-4-1-130, -134 (1976) (amended 1981) (current version at *id.* §§ 9-4-1-40, -54 (1982)).

<sup>25</sup>*Compare id.* § 9-4-1-134 (1982) *with id.* § 35-33-1-1(3).

<sup>26</sup>*Id.* § 35-33-1-1(3).

<sup>27</sup>*Id.* The traffic law, IND. CODE § 9-4-1-134 (1982), permits an arrest for leaving the scene or driving under the influence of alcohol upon "reasonable cause," but only if the offense is coupled with an accident. The new procedure code does not require that there be an accident coupled with driving under the influence of alcohol to permit an arrest, if the offense is outside the presence of the officer. Obviously, leaving the scene of an accident will always be coupled with an accident. *Id.* § 35-33-1-1(3). This author would assume that the more recent procedure code would control.

<sup>28</sup>*Id.* § 35-33-1-1(4). *See generally* *Works v. State*, 266 Ind. 250, 362 N.E.2d 144 (1977); *Brooks v. State*, 249 Ind. 291, 231 N.E.2d 816 (1967); *Doering v. State*, 49 Ind. 56 (1874).

<sup>29</sup>*See generally* *Lander v. State*, 238 Ind. 680, 154 N.E.2d 507 (1958); *Dailey v. State*, 194 Ind. 683, 144 N.E.2d 523 (1924).



presence.<sup>30</sup> If a suspect admits that he committed a crime, the offense may be considered to have been committed in the presence of the arresting officer.<sup>31</sup> Because this statute merely carries forward the common law misdemeanor arrest powers of police, it must be construed in light of the common law.<sup>32</sup>

In connection with misdemeanor arrests, the new procedure code was amended in 1982 to provide that a law enforcement officer may issue a summons and promise to appear, in lieu of arresting a person who, in the officer's presence, has committed a misdemeanor, other than a traffic misdemeanor.<sup>33</sup> The decision whether to issue the summons is within the discretion of the arresting officer. The statute also sets out the suggested form for the summons and promise to appear.<sup>34</sup> The summons and promise to appear must be filed in the appropriate court and a copy given to the prosecuting attorney.<sup>35</sup>

As noted above, misdemeanors arising from a traffic offense may not be within the new code's misdemeanor summons procedure. A separate traffic statute provides that a person arrested for a traffic misdemeanor<sup>36</sup> must be taken immediately before a court in the county

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<sup>30</sup>See *People v. Goldberg*, 280 N.Y.S.2d 646, 227 N.E.2d 575, *cert. denied*, 390 U.S. 909 (1967) (officer heard, through a door, defendant dial telephone and accept horse wager); *State v. Hines*, 504 P.2d 946 (Ariz. Ct. App. 1973) (alcohol on driver's breath); *Corrao v. State*, 154 Ind. App. 525, 290 N.E.2d 484 (1972) (odor of marijuana); *Mullaney v. State*, 246 A.2d 291 (Md. 1968) (odor of marijuana); *City of Tacoma v. Harris*, 436 P.2d 770 (Wash. 1968) (officer heard breach of peace). See generally 2 W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 23.6(a) (2d ed. 1981); 1 C. THOMPSON, INDIANA CRIMINAL PROCEDURE SOURCEBOOK § 3.4, at 3-7 (1974); Annot., 5 A.L.R.4th 681 (1981); Annot., 27 A.L.R.3d 1446 (1969).

<sup>31</sup>See *Moorehead v. State*, 204 Ind. 307, 183 N.E. 801 (1933); *Drake v. State*, 201 Ind. 235, 165 N.E. 757 (1929).

<sup>32</sup>This would include the common law principle that the officer must not be a trespasser when the offense is in his presence. See *People v. Wright*, 242 N.E.2d 180 (Ill. 1968); see also W. RINGEL, *supra* note 30; C. THOMPSON, *supra* note 30.

<sup>33</sup>IND. CODE § 35-33-4-1(d) (1982). This statutory provision may reflect the modern trend. See 2 W. LAFAYE, SEARCH AND SEIZURE § 5.1(h), at 256 (1978).

<sup>34</sup>IND. CODE § 35-33-4-1(e) (1982). A separate form for a summons and promise to appear is established for traffic offenses. *Id.* § 9-4-7-4.

<sup>35</sup>*Id.* § 35-33-4-1(f) (amending *id.* § 35-33-4-1 (Supp. 1981)).

<sup>36</sup>Traffic offenses that remain a felony or misdemeanor after last year's "decriminalization" of traffic crimes are: misuse of identification plates and titles in salvage yards, IND. CODE § 9-1-3.6-11 (1982); altering special engine numbers, *id.* § 9-1-3-6; operating motor vehicle without ever having obtained a valid license, *id.* §§ 9-1-4-26.5, -27; possession of fictitious operator's license, revoked or suspended driver's license, lending a license to another, failure to surrender a license when suspended or revoked, giving false information to obtain a license, and selling or possessing false titles, *id.* §§ 9-1-4-47, -53(a); driving while license suspended or revoked, *id.* §§ 9-1-4-52, -53(b); failure to surrender suspended, revoked, cancelled, or current driver's license on demand, *id.* § 9-2-1-10(b); driving without proof of financial responsibility, *id.* § 9-4-1-53.5 (effective Jan. 1, 1983); leaving scene of personal injury accident, *id.* § 9-4-1-40; leaving

where the offense "is alleged to have been committed and that has jurisdiction of the offense and is nearest or most accessible to the place where the arrest is made."<sup>37</sup> This traffic statute deals less with the arrest powers of law enforcement officers than with the power to take the person into custody following an arrest. In the event of at least one of six statutorily defined situations, the police officer must take the arrestee before the nearest available judge.<sup>38</sup> However, except for the offenses of leaving the scene of an accident, driving under the influence of alcohol, and driving with a suspended or revoked license, a police officer can simply issue a summons and promise to appear. Therefore, arrest procedures for misdemeanants under the new procedure code and under the traffic laws are virtually identical; although in the case of a traffic misdemeanor, a police officer would apparently have the discretion to take someone into custody only if a promise to appear was not signed.

The next subsection concerning arrest is one of the most confusing subsections of the new code and must be construed with other recent changes in the law, especially those changes that occurred last year in the traffic laws. The new arrest subsection states that a person may be arrested when the

person charged with an infraction or ordinance violation refuses to either:

(A) produce a valid operator's license or nondriver identification card; or

(B) give his name and address, in order that he can be summoned to appear.<sup>39</sup>

According to this subsection, it should be emphasized that a person

scene of property accident, *id.* §§ 9-4-1-41, -127.1; failure to report personal injury accident to local police or sheriff, *id.* §§ 9-4-1-45(a), -127.1; driving while intoxicated, *id.* § 9-4-1-54; reckless driving, *id.* § 9-4-1-56.1. Every other traffic offense has been classified as a Class C infraction. *Id.* §§ 9-1-3-11, 9-4-1-127.1(b).

<sup>37</sup>*Id.* § 9-4-1-130.1 (1982).

<sup>38</sup>The Indiana Code provides that the police officer must take the arrestee before the nearest available judge:

- (1) When the person demands an immediate appearance before a court.
- (2) When the person is charged with an offense causing or contributing to an accident resulting in injury or death to any person.
- (3) When the person is charged with . . . [driving under the influence of alcohol].
- (4) When the person is charged with failure to stop in the event of an accident causing death, personal injuries, or damage to property.
- (5) When the person refuses to give his written promise to appear in court.
- (6) When the person is charged with driving while his license is suspended or revoked.

IND. CODE § 9-4-1-130.1 (1982). A non-resident can be released upon furnishing a security deposit. *Id.* § 9-4-1-131.

<sup>39</sup>IND. CODE § 35-33-1-1(5) (1982) (amending *id.* § 35-33-1-1 (Supp. 1981)).



who has committed an infraction or has violated an ordinance cannot be arrested for that offense alone. Rather, the basis for the arrest is the offense of not providing identifying information so that the person can be summoned into court. Although this basis for the arrest is unclear when the subsection is read alone, the basis is clarified when the arrest subsection is read together with the new procedure enacted for the enforcement of infraction and ordinance violations, which provides that

[a] person who knowingly or intentionally refuses to provide either his:

- (1) name, address, and date of birth; or
- (2) driver's license, if in his possession;

to a law enforcement officer who has stopped the person for an infraction or ordinance violation commits a Class C misdemeanor.<sup>40</sup>

Despite minor discrepancies between these two statutes,<sup>41</sup> they are essentially the same. The ordinance and infraction enforcement statute, however, details the specific crime for which the person is being arrested.

Interpreting the two statutes in light of each other avoids another anomalous result. As discussed previously, a law enforcement officer may make an arrest for a felony based upon probable cause, even if the crime is not committed in his presence, but an officer only may make an arrest for a misdemeanor that is committed in his presence. The infraction and ordinance arrest provision does not require that the offense be committed "in the presence" of a law enforcement officer, but it would be anomalous to give an officer greater arrest powers for infractions and ordinance violations than for misdemeanors. However, if the arrest subsection is properly interpreted, an officer is not arresting a person for an infraction or ordinance violation. Rather, the arrest is made for a Class C misdemeanor that is committed in the officer's presence—the failure to provide identifying information to the officer who is issuing a ticket or summons. Thus,

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<sup>40</sup>*Id.* § 34-4-32-3 (1982); *see id.* § 34-4-32-2 (permitting officer to make a brief detention of person where officer has good faith belief that person committed infraction or ordinance violation). *See* *People v. Clyne*, 189 Colo. 412, 541 P.2d 71 (1975) (defendant's arrest for violation of ordinance unlawful, because municipal code provides that custodial arrest is proper only when person does not furnish sufficient evidence of identity or officer has reasonable grounds to believe that person will disregard promise to appear).

<sup>41</sup>Under the arrest statute, the person need only provide his name and address, whereas the enforcement statute requires his date of birth. The arrest statute speaks of a valid operator's license or a nondriver identification card, while the enforcement statute mentions only a driver's license.

it is only as a result of the arrest made for the misdemeanor that was committed "in the presence" of the officer that the officer can issue a ticket or summons for an infraction or ordinance violation that was not committed in his presence.

It is foreseeable that these statutes might be challenged on constitutional grounds. It could be argued that these statutes allow a person to be arrested solely for not providing identifying information to a law enforcement officer who has detained him. In *Lawson v. Kolender*,<sup>42</sup> a recent decision by the Court of Appeals for the Ninth Circuit that may be reviewed by the United States Supreme Court, a California vagrancy statute that required a person who is stopped by a police officer to provide reliable identification when requested by the officer was struck down as an unconstitutional search and seizure. Under the California loitering statute,<sup>43</sup> a police officer could stop a person and could request identification when the officer had a reasonable suspicion of criminal activity, in accordance with the standards set out in *Terry v. Ohio*.<sup>44</sup> The court in *Lawson* held that statutes that require the production of identification violate the fourth amendment because, as a result of the demand for identification, these "statutes bootstrap the authority to arrest on less than probable cause, and the serious intrusion on personal security outweighs the mere possibility that identification may provide a link leading to arrest."<sup>45</sup>

It is true that the failure to provide identifying information under the Indiana statutes provides a basis for arrest where none existed before that failure. However, the context of the Indiana statutes is fundamentally different from the context of California's vagrancy statute. Under the Indiana statutes, the detained person is not being requested to provide identifying information as part of a criminal investigation into suspicious activity. Instead, the person has already violated either a state statute or the law of a local unit of government. The identifying information is not sought as either a basis to bootstrap a *Terry*-type "stop" into probable cause for arrest or to provide additional information in a criminal investigation. Indeed, the identifying information is sought to insure that the detained person may

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<sup>42</sup>658 F.2d 1362 (9th Cir. 1981), *prob. juris. noted*, 102 S. Ct. 1629 (1982).

<sup>43</sup>CAL. PENAL CODE § 647(e) (West 1970).

<sup>44</sup>392 U.S. 1, 27 (1968) ("whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger"). Whether a request for identification under these circumstances is an unconstitutional search and seizure was specifically left open by the United States Supreme Court in *Brown v. Texas*, 443 U.S. 47, 53 n.3 (1979) (holding that a person could not be required to furnish identification if not reasonably suspected of any criminal conduct). *See also* *Michigan v. DeFillippo*, 443 U.S. 31 (1979) (evidence uncovered in a warrantless search, in good faith reliance on an ordinance later found to be unconstitutional, did not have to be suppressed because police had abundant probable cause).

<sup>45</sup>658 F.2d at 1366-67.



not be arrested, but *may* be issued a summons and promise to appear. Therefore, the new arrest statute and infraction and ordinance enforcement statute should not be considered to permit an unconstitutional search or seizure of the person.<sup>46</sup>

The Court of Appeals for the Ninth Circuit also found that the California vagrancy statute was constitutionally defective because it was so vague and indefinite that it encouraged arbitrary and discriminatory enforcement by police officers. The statute granted the police unfettered discretion because it did not provide standards for determining whether a person is engaged in suspicious loitering and failed to specify what forms of identification were sufficient to satisfy the statute. Indiana's arrest and infraction and ordinance enforcement statutes obviously do not suffer from this defect. A police officer is empowered to detain someone and ask for identification under these statutes only when a law has been violated. In addition, the forms of identification that will satisfy the statutes are clearly set out.

Because the California statute was being struck down for other reasons, the Ninth Circuit did not directly decide whether the provision of the statute that requires a detained person to produce identification was violative of the constitutional privilege against self-incrimination.<sup>47</sup> However, the federal court noted that other courts had struck down similar statutes on the grounds that an individual may not be compelled to identify himself.<sup>48</sup>

A challenge to the Indiana statutes on the ground that they compel a person to incriminate himself by providing identifying information must be assessed in view of the United States Supreme Court's decision in *California v. Byers*.<sup>49</sup> In *Byers*, a California "hit and run" statute, much like the Indiana statutes,<sup>50</sup> that requires the person involved in an accident to stop and leave identifying information was challenged on the grounds that it violated the constitutional privilege against self-incrimination. Even though stopping a vehicle after an accident and identifying oneself as the person involved is, arguably, more incriminating than merely giving identifying information to an officer after one has been accused of violating an ordinance by a police officer, a majority of the United States Supreme Court in *Byers* found no constitutional violation.<sup>51</sup> Especially important in the interpretation

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<sup>46</sup>*Cf.* *Gomez v. Turner*, 672 F.2d 134, 144 (D.C. Cir. 1982) (request that pedestrians give identification is not an unconstitutional "seizure").

<sup>47</sup>U.S. CONST. amend. V; IND. CONST. art. 1, § 14.

<sup>48</sup>658 F.2d at 1371; see *People v. DeFillippo*, 262 N.W.2d 921, 924 (Mich. Ct. App. 1977), *rev'd on other grounds*, 443 U.S. 31 (1979).

<sup>49</sup>402 U.S. 424 (1971).

<sup>50</sup>*Compare* IND. CODE §§ 9-4-1-40(b), -42 (1982) with CAL. VEHICLE CODE § 20002(a)(1) (West 1976).

<sup>51</sup>See 402 U.S. 424, 427-34.

of the Indiana statutes is this statement in the majority opinion of *Byers*: "Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles."<sup>52</sup> Again, it must be emphasized that the new Indiana statutes are not concerned with investigatory questioning after a "stop." It is also significant to note that requiring basic identifying information, even when one is in custody and going through the booking process, is considered to be outside the scope of *Miranda v. Arizona*.<sup>53</sup>

The final attack that might be made against this particular statutory arrest scheme, especially since the "civilizing" of most traffic offenses,<sup>54</sup> is that a person should not be subjected to arrest for failing to provide an officer with identifying information that would enable the enforcement of a civil judgment. However, clearly it is within the police power of the state to regulate traffic on public roads.<sup>55</sup> Also, even though a statutory scheme may be essentially civil in nature, portions of it dealing with arrest may be criminal in character.<sup>56</sup> Therefore, this statutory scheme is not an unwarranted intrusion of law enforcement officers and criminal procedure into a civil process.

Another section on arrest codifies the common law arrest powers of citizens.<sup>57</sup> The section provides that a citizen can arrest another person if a felony has been committed in the citizen's presence or if there is probable cause to believe that the person has committed a felony.<sup>58</sup> The common law in Indiana did not require,<sup>59</sup> nor does the new statute require, that the felony be committed in the presence of the arresting citizen.<sup>60</sup> However, there is one important distinction between the felony arrest powers of a law enforcement officer and those of a citizen, both at common law and in the new arrest section.

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<sup>52</sup>*Id.* at 432.

<sup>53</sup>384 U.S. 436 (1966). For cases that support the textual proposition that no *Miranda* warnings are required before asking to see a license, see *United States v. Chase*, 414 F.2d 780 (9th Cir. 1969); *Pulliam v. State*, 264 Ind. 382, 345 N.E.2d 229 (1976).

<sup>54</sup>Proceedings to enforce an infraction or ordinance violation are conducted in accordance with the Indiana Rules of Trial Procedure, IND. CODE § 34-4-32-1(c)(1) (1982), and are proved by a preponderance of the evidence, *id.* § 34-4-32-1(d). A "judgment" is entered against the defendant for proven violations. *Id.* § 34-4-32-4.

<sup>55</sup>60 C.J.S. *Motor Vehicles* § 14 (1969); 7A AM. JUR. 2d *Automobiles and Highway Traffic* §§ 14, 15 (1980).

<sup>56</sup>See *State ex rel. Beaven v. Marion Juvenile Court*, 243 Ind. 209, 184 N.E.2d 20 (1962).

<sup>57</sup>IND. CODE § 35-33-1-4 (1982).

<sup>58</sup>*Id.* § 35-33-1-4(a)(1) to -4(a)(2).

<sup>59</sup>See, e.g., *Kennedy v. State*, 107 Ind. 144, 6 N.E. 305 (1886); *Doering v. State*, 49 Ind. 56 (1874); *Teagarden v. Graham*, 31 Ind. 422 (1869).

<sup>60</sup>See *Smith v. State*, 258 Ind. 594, 283 N.E.2d 365 (1972).



For an arrest by a law enforcement officer to be valid, the officer need only have probable cause to believe that a felony was committed, but for an arrest by a citizen to be valid, a felony must actually have been committed.<sup>61</sup>

The new provisions regarding arrest also state that a private citizen may make an arrest for a misdemeanor committed in his presence.<sup>62</sup> Although the common law on this point in Indiana is sparse, apparently the right of a citizen to arrest for a misdemeanor did exist.<sup>63</sup> However, in addition to the "in the presence" requirement for misdemeanor arrests, the statute places two additional restrictions upon a citizen's arrest powers: the misdemeanor must involve a breach of the peace, and the arrest must be necessary to prevent the continuance of the breach of peace.<sup>64</sup> There is no crime of "breach of the peace" in Indiana and the legislature did not attempt to further define the term. At common law, the term "breach of the peace" could be regarded as a synonym for crime,<sup>65</sup> but the legislature certainly did not intend the definition to be this broad. Although either "rioting"<sup>66</sup> or "disorderly conduct"<sup>67</sup> clearly would constitute a breach of the peace, the term "breach of the peace" is indefinite beyond those crimes.

As soon as practical after the citizen makes an arrest, he must notify a law enforcement officer and deliver the arrestee to the custody of the officer.<sup>68</sup> The law enforcement officer may process the arrested person as if the officer had arrested him and is not liable for false arrest or false imprisonment.<sup>69</sup> After receiving custody of the arrestee, the decision to process the arrested person is apparently within the discretion of the officer; the officer could simply decide to release the arrestee.

The next chapter in this article of the code concerns the issuance of arrest warrants.<sup>70</sup> No arrest warrant may be issued until either an

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<sup>61</sup>*Id.*; *Knotts v. State*, 243 Ind. 501, 187 N.E.2d 571 (1963); *Simmons v. Vandyke*, 138 Ind. 380, 37 N.E. 973 (1894). Another distinction between a law enforcement officer's arrest powers and those of a private citizen is found in the amount of force that may be used to effect an arrest. See IND. CODE § 35-41-3-3 (1982); *Rose v. State*, 431 N.E.2d 521 (Ind. Ct. App. 1982).

<sup>62</sup>IND. CODE § 35-33-1-4(a)(3) (1982).

<sup>63</sup>See *Golibart v. Sullivan*, 30 Ind. App. 428, 435, 66 N.E. 188, 191 (1903).

<sup>64</sup>IND. CODE § 35-33-1-4(a)(3) (1982).

<sup>65</sup>See R. PERKINS, CRIMINAL LAW 399 (2d ed. 1969); see also IND. CODE § 35-1-5-13 (1982).

<sup>66</sup>IND. CODE § 35-45-1-2 (1982).

<sup>67</sup>*Id.* § 35-45-1-3; R. PERKINS, *supra* note 65, at 400.

<sup>68</sup>IND. CODE § 35-33-1-4(b) (1982).

<sup>69</sup>*Id.* § 35-33-1-4(c). This statute immunizes only the officer. If the citizen makes an illegal arrest, he may be civilly liable for false arrest, false imprisonment, or assault and battery. See *Doering v. State*, 49 Ind. 56 (1874); see also *Teagarden v. Graham*, 31 Ind. 422 (1869).

<sup>70</sup>See IND. CODE §§ 35-33-2-1 to -7 (1982).

indictment or an information has been filed.<sup>71</sup> Furthermore, a law enforcement officer may not obtain an arrest warrant simply by presenting probable cause to a judicial officer, as he can to obtain a search warrant.<sup>72</sup>

The chapter on arrest warrants also clears up a point of confusion in Indiana criminal procedure. Through inartful wording of the prior Indiana statute,<sup>73</sup> it was unclear whether there must be an independent judicial determination of probable cause when a grand jury has returned an indictment. The new code states twice that when an indictment is returned, a court can issue an arrest warrant without a judicial determination of probable cause.<sup>74</sup> However, a judicial determination of probable cause must be made after the filing of an information.<sup>75</sup> This is consistent with Indiana case law that holds that the return of an indictment by a grand jury is conclusive evidence of probable cause,<sup>76</sup> but that a judicial determination of probable cause must be made when a prosecutor's information is filed, if an arrest warrant is issued.<sup>77</sup>

Section 5 of the chapter on arrest warrants<sup>78</sup> adds a new statutory concept to Indiana criminal procedure. The section provides that when an indictment or information has been dismissed, the court will order the sheriff to make a return on an outstanding arrest warrant or summons that relates to the charge, stating that the indictment or information has been dismissed. In addition, the sheriff must give notice of the dismissal to any law enforcement officer to whom the arrest warrant or summons had been delivered. Although Indiana courts have recognized that the arrest warrant ceases to exist when an indictment or an information has been dismissed,<sup>79</sup> this new subsection in-

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<sup>71</sup>*Id.* § 35-33-2-1(c).

<sup>72</sup>*Compare* IND. CODE § 35-33-2-1(c) with §§ 35-33-5-1 to -7 (1982). This was a matter of disagreement in the Criminal Law Study Commission. The majority believed that a citizen should not be subjected to an arrest, even if there were probable cause for arrest, if the body with the decision to file criminal charges, the grand jury or the prosecuting attorney, should decide that there was insufficient evidence to proceed to trial or that the case otherwise lacked prosecutive merit. Conversation with Richard P. Good, member of Criminal Law Study Commission (June 25, 1982).

<sup>73</sup>*See* IND. CODE § 35-3.1-1-1(d) (Supp. 1981) (repealed 1982).

<sup>74</sup>*Id.* § 35-33-2-1(a), (c)(1) (1982).

<sup>75</sup>*Id.* § 35-33-2-1(b), (c)(2).

<sup>76</sup>*State ex rel. French v. Hendricks* Superior Court, 252 Ind. 213, 224, 247 N.E.2d 519, 526 (1969).

<sup>77</sup>*Kinnaird v. State*, 251 Ind. 506, 516, 242 N.E.2d 500, 506 (1968).

<sup>78</sup>IND. CODE § 35-33-2-5 (1982).

<sup>79</sup>*See Dearing v. State*, 229 Ind. 131, 137, 95 N.E.2d 832, 835 (1951). However, although three members of the Indiana Supreme Court stated in *Dearing* that an arrest warrant expired when the criminal charge upon which it was based was dismissed, the Indiana Court of Appeals interpreted the opinion as holding that an arrest war-



cludes specific directives to the sheriff regarding his duties after the charge is dismissed.

The final statutory change in arrest law to be discussed herein concerns the issuance of a summons by a court in a misdemeanor case. Prior law provided that when an indictment or information was filed in a misdemeanor case, the court could direct the issuance of a summons instead of an arrest warrant "if the court has reasonable ground to believe that the person will appear in response to a summons."<sup>80</sup> Because a court will ordinarily not possess facts that would enable it to decide whether a person would respond to a summons, the new law permits a court simply to exercise its discretion in issuing either a warrant or a summons.<sup>81</sup>

A separate statutory section regarding arrest<sup>82</sup> gives a judge the power to arrest or to order the arrest of a person whom he has probable cause to believe has committed a crime.<sup>83</sup> Another section,<sup>84</sup> consistent with the coroner's powers established in title 36,<sup>85</sup> provides that the coroner has the arrest powers of the sheriff if the sheriff is incapacitated or has a conflict of interests, and has no chief deputy who could perform the duties, and that the coroner is authorized to arrest the sheriff under authority of a warrant.

Although not included in the new procedure code, other statutes in the prior code that pertain to the arrest power were retained. Among these are the laws concerning the authority to use force in entering a premises to make an arrest,<sup>86</sup> the requirement that certain police officers either wear a uniform or drive a marked car when making a traffic arrest,<sup>87</sup> and the requirement that most police officers in the state receive training at the Law Enforcement Academy within one year from the date of their employment.<sup>88</sup> Also, a law enforce-

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rant expires at the end of the term of the court that issued it. *See Hughes v. State*, 385 N.E.2d 461, 464 (Ind. Ct. App. (1979)).

*Hughes* led to the enactment of Act of April 4, 1977, Pub. L. No. 334, 1977 Ind. Acts 1511, 1512, regarding the nonexpiration of felony arrest warrants and the issuance of "rearrest" warrants for misdemeanors, which is now found in the new procedure code at IND. CODE § 35-33-2-4 (1982).

<sup>80</sup>IND. CODE § 35-1-17-2(b) (1978) (repealed 1981).

<sup>81</sup>*Id.* § 35-33-4-1(a) (1982).

<sup>82</sup>*Id.* § 35-33-1-2.

<sup>83</sup>*Cf. id.* § 35-1-21-1 (1978) (repealed 1981) (giving judges, coroners, and law enforcement officials the power to arrest any person violating a state statute, without specifying a probable cause requirement); *Cato v. Mayes*, 388 N.E.2d 530 (Ind. 1979) (holding justice of peace is immune from liability for false arrest).

<sup>84</sup>IND. CODE § 35-33-1-3 (1982).

<sup>85</sup>*Id.* §§ 36-2-14-4, -5.

<sup>86</sup>*Id.* §§ 35-1-19-4, -6 to -7. There is a general "knock and announce" requirement absent exigent circumstances. *See Cannon v. State*, 414 N.E.2d 578 (Ind. Ct. App. 1980); *Johnson v. State*, 157 Ind. App. 105, 299 N.E.2d 194 (1973).

<sup>87</sup>IND. CODE § 9-4-8-1 (1982); *see State v. Whitney*, 377 N.E.2d 652 (Ind. Ct. App. 1977).

<sup>88</sup>IND. CODE § 5-2-1-9(b) (1982).

ment officer may take a possible delinquent child into custody if the officer has probable cause to believe the child has committed a delinquent act.<sup>89</sup> Because a delinquent act could be a felony, a misdemeanor, or a juvenile status offense, the officer could take the child into custody solely upon probable cause, even if the misdemeanor were not committed in his presence.<sup>90</sup>

Therefore, it can be seen that the chapters in the new procedure code concerning arrest, as well as the general law of arrest, are an amalgam of something old and something new. Moreover, the discussion of arrest makes one other important point about the new criminal procedure code in general. All of the law relating to a particular aspect of criminal procedure will not be found in the new procedure code. Not even all statutes relating to that subject will be found there. Existing statutes and case law precedent continue to supplement the new procedure code.

### B. Initial Hearings

One of the most significant developments of the new code is the chapter on initial hearings.<sup>91</sup> Many of the series of older statutes dealing with the production of an accused before a magistrate after a warrantless arrest, preliminary hearings, and preliminary charge procedures have been eliminated.<sup>92</sup> Also missing from the new code is the phase in criminal procedure known as arraignment.<sup>93</sup> Historically, arraignment was considered a two-step procedure. The defendant was first informed of the charges against him by a reading of the indictment or information and then he was required to plead to the charges.<sup>94</sup> Now the defendant will be advised of the charges against him at an initial hearing and, at the same time, an automatic plea of not guilty will be entered for the defendant. The plea will become a formal plea of not guilty after the passage of specified periods of time.<sup>95</sup> In essence, the chapter on initial hearings in the new code<sup>96</sup>

<sup>89</sup>*Id.* § 31-6-4-4(b).

<sup>90</sup>The term "delinquent act" is defined at IND. CODE § 31-6-4-1(a) (1982), and includes acts that would be "offenses" if committed by an adult. An "offense" is defined as either a felony or a misdemeanor. *Id.* § 35-41-1-2. Thus, the authority of a law enforcement officer to take a child into custody is broader than the authority to arrest an adult for a misdemeanor. See IND. CODE ANN. § 31-6-4-4 commentary (West 1979).

<sup>91</sup>Act of May 5, 1981, Pub. L. No. 298, § 2, 1981 Ind. Acts 2326-28 (codified at IND. CODE §§ 35-33-7-1 to -7 (1982)).

<sup>92</sup>IND. CODE §§ 35-1-7-1, -8-1, 35-4-1-1 (Supp. 1981) (repealed 1982).

<sup>93</sup>See *id.* § 35-4.1-1-1 (1976) (repealed 1982).

<sup>94</sup>See *id.*; see also *Andrews v. State*, 196 Ind. 12, 146 N.E. 817 (1925).

<sup>95</sup>IND. CODE § 35-33-7-5(7) (1982). This is similar to prior law, where a plea of not guilty was entered if a defendant stood mute or refused to plead. See *id.* § 35-4.1-1-1(d) (1976) (repealed 1982).

<sup>96</sup>*Id.* §§ 35-33-7-1 to -7 (1982). See *id.* §§ 35-1-7-1, 35-1-8-1, 35-4-1-1.



serves the same function as that of the prior law on preliminary hearings, preliminary charges, and arraignments.

The initial hearing procedures are triggered by the arrest of a person, with or without a warrant; however, the procedures will differ depending upon whether the arrest was made pursuant to a warrant. In addition, a person who is issued a summons to appear, in lieu of an arrest,<sup>97</sup> is apparently entitled to an initial hearing because the summons directs the person to appear before a court at a stated time and place.<sup>98</sup> However, the initial hearing procedures applicable to a summons are unclear. The initial hearing chapter provides that if a person is "arrested or summoned to appear" before a formal charge is filed, the charge must be prepared at or before the initial hearing.<sup>99</sup> However, the time periods in the initial hearing chapter are geared to arrest and detention, or to arrest and release on bail. A summons to appear is neither of those. Therefore, it is quite possible that a person who is summoned to appear need not have an initial appearance before the court within the time periods that the statute otherwise provides for initial hearings.

The chapter on initial hearings provides that a person who is arrested without a warrant must be taken promptly before a judicial officer in the county where the arrest is made or in any county that is believed to have venue of the offense.<sup>100</sup> The word "promptly" is not defined in the new code and its definition will no doubt vary under the circumstances of the particular case, but existing case law may provide guidelines for a suitable time frame.<sup>101</sup> If the suspect is released on bond immediately after arrest, he need not appear before

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<sup>97</sup>See IND. CODE § 35-33-4-1 (1982).

<sup>98</sup>*Id.* § 35-33-4-1(d), (e).

<sup>99</sup>*Id.* § 35-33-7-3(a). The statute does not state to what the person is being summoned, but the intent is probably that the summons is to the initial hearing, because that is the first step in the criminal process after arrest or detention.

<sup>100</sup>*Id.* § 35-33-7-1.

<sup>101</sup>For city police, the code provides that a person may not be detained longer than 24 hours except where Sunday intervenes, in which case a person may not be detained longer than 48 hours. IND. CODE § 36-8-3-11 (1982). The United States District Court for the Northern District of Indiana relied on a predecessor to this statute, *id.* § 18-1-11-8 (1976) (repealed 1982), to impose a general 24- to 48-hour requirement for the production of an arrestee before a judge after a warrantless arrest. *Dommer v. Hatcher*, 427 F. Supp. 1040 (N.D. Ind. 1977), *rev'd sub nom.* *Dommer v. Crawford*, 638 F.2d 1031 (7th Cir. 1980). Despite its reversal on federal abstention grounds, *Dommer* remains an excellent analysis of Indiana "initial hearing" law prior to the new procedure code. Also, although IND. CODE § 36-8-3-11 (1982) and *Dommer* might provide appropriate guidelines for the definition of "promptly" in the new procedure code, it is questionable whether it is binding on any police agency other than city police. See *Grooms v. Fervida*, 396 N.E.2d 405 (Ind. Ct. App. 1979). The accused need only be produced before the court during its normal hours for conducting business. See *Hill v. Otte*, 258 Ind. 421, 281 N.E.2d 811 (1972).

the judge for his initial hearing until any time up to twenty calendar days after his arrest.<sup>102</sup> Even when a person is arrested pursuant to an arrest warrant, he must be taken promptly before the court that issued the warrant or before a judicial officer that has jurisdiction over the arrestee, although the initial hearing can be delayed for up to twenty days after the arrest if the arrestee has been released in accordance with the provisions of the arrest warrant.<sup>103</sup> Thus, there is no difference in the timing of the initial hearing for those arrested with a warrant and those arrested without a warrant. However, as will be explained below, the nature of the hearing before the judicial officer will vary according to whether the arrest was made with a warrant.

If the person has been arrested without a warrant, the judge's first task at the initial hearing will be to determine whether there is probable cause to believe that the person committed a crime.<sup>104</sup> This can be accomplished either at the initial hearing or before the initial hearing.<sup>105</sup> The facts for the warrantless arrest are submitted to the judicial officer in an *ex parte* affidavit.<sup>106</sup> The facts also can be submitted orally under oath.<sup>107</sup> If the judge decides that probable cause exists, the person will be held to answer in the proper court.<sup>108</sup> However, if the judge decides that probable cause is lacking, or if the prosecuting attorney indicates on the record that no charge will be filed against the person, the judicial officer will order the arrestee released.<sup>109</sup> However, a person who is released later may be charged with and arrested for the same offense.<sup>110</sup>

If the person is arrested under the authority of a warrant, after an indictment or information has been filed, an initial hearing still must be held.<sup>111</sup> In addition, the person must be brought before the judge promptly after arrest or within twenty days, if he has been released.<sup>112</sup>

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<sup>102</sup>IND. CODE § 35-33-7-1 (1982).

<sup>103</sup>*Id.* § 35-33-7-4.

<sup>104</sup>*Id.* § 35-33-7-2(a).

<sup>105</sup>*Id.*

<sup>106</sup>*Id.* There is no constitutional requirement that the probable cause determination be made in an adversarial context. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); *Tinsley v. State*, 164 Ind. App. 683, 330 N.E.2d 399 (1975).

<sup>107</sup>IND. CODE § 35-33-7-2(a) (1982). If the facts to prove probable cause are submitted orally under oath, the proceeding will be recorded, but it will only be transcribed upon request of a party or upon a court order. *Id.*

<sup>108</sup>*Id.* § 35-33-7-2(b).

<sup>109</sup>*Id.*

<sup>110</sup>*Id.* § 35-33-7-7. This is consistent with present law. *See Denson v. State*, 263 Ind. 315, 330 N.E.2d 734 (1975); *State ex rel. Hale v. Marion County Mun. Court*, 234 Ind. 467, 127 N.E.2d 897 (1955).

<sup>111</sup>IND. CODE § 35-33-7-4 (1982).

<sup>112</sup>*Id.*



However, the probable cause determination phase of an initial hearing is not required because the inquiry would be a needless duplication of the probable cause decision. When the prosecutor files a criminal information, a court will make a judicial determination of probable cause before issuing an arrest warrant.<sup>113</sup> When a grand jury returns an indictment, it is conclusive evidence of probable cause;<sup>114</sup> therefore, an arrest warrant is issued without a judge's determination of probable cause.<sup>115</sup> The absence of a second probable cause determination for an arrest by warrant is completely consistent with Indiana case law, which has held that a preliminary hearing to determine probable cause is not required when an arrest warrant was issued after the filing of an information.<sup>116</sup>

The criminal charges must be filed at or before the initial hearing, unless the prosecutor informs the court that no charges will be filed, in which case the accused is released.<sup>117</sup> When the person is arrested pursuant to a warrant, either the grand jury or the prosecuting attorney has already decided what preliminary charges will be filed. However, when a law enforcement officer makes a warrantless arrest, the prosecuting attorney has not decided what charges should be filed. Thus, for warrantless arrests, the prosecutor may state that more time is needed to evaluate the case, or that the transfer of the case to another court is necessary, and "the court shall recess or continue the initial hearing for up to seventy-two (72) hours, excluding intervening Saturdays, Sundays, and legal holidays."<sup>118</sup> This provision anticipates the situation in which there is probable cause to charge a crime, but the case may lack prosecutive merit for some reason. It should be noted, however, that before the initial hearing can be recessed, the court must make the required probable cause determination for warrantless arrests.

At this point in the initial hearing for a warrantless arrest, the procedures for felonies and misdemeanors diverge. In a misdemeanor case, the hearing can be recessed after the probable cause decision. However, in a felony case, the court must advise the accused of his

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<sup>113</sup>*Id.* § 35-33-2-1(b). See *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Kinnaird v. State*, 251 Ind. 506, 242 N.E.2d 500 (1968). See also *supra* notes 73-77 and accompanying text.

<sup>114</sup>*Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975); *State ex rel. French v. Hendricks* Superior Court, 252 Ind. 213, 224, 247 N.E.2d 519, 526 (1969).

<sup>115</sup>See IND. CODE § 35-33-2-1(a) (1982).

<sup>116</sup>*E.g.*, *Poindexter v. State*, 268 Ind. 167, 374 N.E.2d 509 (1978); *Penn v. State*, 242 Ind. 359, 177 N.E.2d 889 (1961). Also, in *Dommer v. Hatcher*, 427 F. Supp. 1040, 1047 (N.D. Ind. 1977), the probable cause determination at the initial appearance before a judge was deemed unnecessary when the arrest was made pursuant to a warrant issued after the filing of an indictment or information. See also *supra* note 101.

<sup>117</sup>IND. CODE § 35-33-7-2 (1982).

<sup>118</sup>*Id.* § 35-33-7-3(b).

right to counsel and other rights before the recess of the hearing.<sup>119</sup> When the initial hearing is reconvened after the recess, the alleged misdemeanor will be advised of the same rights to which an alleged felon would be advised before the recess, except that the alleged misdemeanor will be advised that he has ten days, rather than twenty days, after the completion of the initial hearing in which to retain counsel.<sup>120</sup> If a person is charged with one or more misdemeanors, then misdemeanor procedures will be followed. However, if a person is charged with both a felony and a misdemeanor, felony procedures will prevail.<sup>121</sup> Once the initial hearing in a felony case reconvenes after a recess, the court probably will not need to advise the accused of his rights again, but the statute is not clear on this procedure.

At the initial hearing, the judge will have the filed charges before him, and can advise both accused felons and misdemeanants of the charges against them.<sup>122</sup> The court will also direct the prosecuting attorney to give the defendant or his attorney a copy of any formal felony charges that are already filed or that are ready to be filed; the prosecuting attorney must give an accused misdemeanor or his attorney a copy of misdemeanor charges only if they request them.<sup>123</sup> At this time, the court will advise the defendant that a preliminary plea of not guilty is being entered for him and that the plea will become a formal plea of not guilty within twenty days of the initial hearing in a felony case,<sup>124</sup> or within ten days in a misdemeanor case.<sup>125</sup>

<sup>119</sup>*Id.* § 35-33-7-5(c). The court in a felony case must advise the defendant: (1) that he has a right to retain counsel and if he intends to retain counsel he must do so within:

(A) twenty (20) days if the person is charged with a felony; . . . after this initial hearing because there are deadlines for filing motions and raising defenses, and if those deadlines are missed, the legal issues and defenses that could have been raised will be waived;

(2) that he has a right to assigned counsel at no expense to him if he is indigent;

(3) that he has a right to a speedy trial;

(4) of the amount and conditions of bail;

(5) of his privilege against self-incrimination.

*Id.* § 35-33-7-5.

Under prior law the purpose of a preliminary hearing was to "(1) [a]dvice the arrestee of the charges made against him; (2) [a]dvice the arrestee of his constitutional rights; (3) [p]rovide the arrestee with an attorney if arrestee was without funds to hire one; (4) [d]etermine whether there is sufficient evidence that the crime charged has been committed and that the accused committed it." *Nacoff v. State*, 256 Ind. 97, 102, 267 N.E.2d 165, 168 (1971) (citation omitted).

<sup>120</sup>IND. CODE § 35-33-7-5(1)(B) (1982).

<sup>121</sup>*Id.*

<sup>122</sup>*Id.* § 35-33-7-5(6).

<sup>123</sup>*Id.* § 35-33-7-5.

<sup>124</sup>*Id.* § 35-33-7-5(7)(A).

<sup>125</sup>*Id.* § 35-33-7-5(7)(B).



After consulting with counsel, however, if the defendant wishes to enter a different plea,<sup>126</sup> he may do so at the initial hearing.<sup>127</sup>

Before the completion of the initial hearing, the judge must determine whether an accused who requests assigned counsel is indigent.<sup>128</sup> If jurisdiction over an indigent defendant is transferred to another court, the receiving court will assign counsel immediately upon acquiring jurisdiction.<sup>129</sup> The determination of indigency can be reviewed at any time during the proceedings.<sup>130</sup>

Because the new code's "initial hearing" procedures are really a modification of existing preliminary hearing and arraignment statutes, reference may be made to decisions under prior law to answer questions that might arise under the new code. For example, when an accused appears at his initial hearing, he may often be unaccompanied by counsel, especially after a warrantless arrest. Although one of the purposes of the initial hearing is to advise the accused of his right to counsel and to appoint one if he is indigent, arguably, the defendant should be entitled to appointed counsel at the initial hearing. An expansive reading of *Coleman v. Alabama*<sup>131</sup> might lead to this conclusion, but the determination of probable cause before formal charges have been filed has been held not to be a "critical stage" of criminal

<sup>126</sup>The defendant could plead either guilty or guilty but mentally ill. See IND. CODE §§ 35-35-1-1 to -4 (1982).

<sup>127</sup>*Id.* § 35-33-7-5.

<sup>128</sup>*Id.* § 35-33-7-6. The Indiana Supreme Court has detailed the judicial determination of indigency as follows:

First, it appears clear that the defendant does not have to be totally without means to be entitled to counsel. If he legitimately lacks the financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him.

The determination as to the defendant's indigency is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant's total financial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations. The fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered.

*Moore v. State*, 401 N.E.2d 676, 678-79 (Ind. 1980) (citations omitted). See also *Mitchell v. State*, 417 N.E.2d 364, 368 (Ind. Ct. App. 1981); *Bergdorff v. State*, 405 N.E.2d 550, 553-54 (Ind. Ct. App. 1980).

<sup>129</sup>IND. CODE § 35-33-7-6 (1982).

<sup>130</sup>*Id.* This would permit a court to require a defendant to hire private counsel if he came into money during his case. However, a court's duty to appoint counsel arises at any stage of the proceedings when the defendant's indigency causes him to be without counsel. *Moore v. State*, 401 N.E.2d 676, 679 (Ind. 1980).

<sup>131</sup>399 U.S. 1 (1970) (holding that counsel should be provided at a preliminary hearing).

proceedings to which the right to counsel attaches.<sup>132</sup> When the defendant is arrested under authority of a warrant, formal charges will have been filed and, arguably, the defendant would be entitled to counsel at the initial hearing under this circumstance. The Indiana Supreme Court has stated that it is incongruous to require that counsel be appointed to represent the defendant prior to the hearing that is designed to inform the defendant of his right to counsel and, if need be, to appoint counsel for him.<sup>133</sup> Moreover, the United States Supreme Court in *Gerstein v. Pugh*<sup>134</sup> distinguished *Coleman* and held that the right to counsel would not attach at a first appearance or a preliminary hearing before a magistrate when a statutory right to confront and to cross-examine prosecution witnesses at the hearing was not provided and when the purpose of the hearing was not to determine whether charges would be filed.<sup>135</sup> In the new procedure code, there is no right to confront and to cross-examine witnesses at the initial hearing and the decision to charge has already been made. Therefore, it appears that there should be no constitutional right to appointed counsel at the initial hearing.

Another question that might arise is whether the initial hearing can be waived or continued. It might be questioned why anyone would want to waive a hearing that is designed to advise him of certain rights, to determine probable cause, and possibly to appoint counsel. The reason for waiving is that the "omnibus date," which is a trigger date for setting other motion-filing deadlines,<sup>136</sup> is set within certain periods of time after the completion of the initial hearing or after the appearance of counsel and cannot be continued.<sup>137</sup> Therefore, an attorney may seek to delay the setting of an omnibus date by waiving or continuing the initial hearing.

Under prior law, the right to a preliminary hearing could apparently be waived.<sup>138</sup> However, in the event that an initial hearing is waived, common sense would dictate setting the omnibus date relative to the date of the waiver. The purpose of the omnibus date would be defeated if a defendant were permitted to continue indefinitely an omnibus date by waiving an initial hearing. Whether an initial hearing could be continued is another question. Common practice under

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<sup>132</sup>See *Merry v. State*, 166 Ind. App. 199, 335 N.E.2d 249 (1975); see also *Fender v. Lash*, 261 Ind. 373, 304 N.E.2d 209 (1973).

<sup>133</sup>*Fulks v. State*, 255 Ind. 81, 85, 262 N.E.2d 651, 653 (1970).

<sup>134</sup>420 U.S. 103 (1975).

<sup>135</sup>*Id.* at 122-23.

<sup>136</sup>IND. CODE § 35-36-8-2 (1982). For a detailed discussion of the statutory provisions regarding the omnibus date, see *infra* notes 147-82 and accompanying text.

<sup>137</sup>IND. CODE § 35-36-8-1 (1982).

<sup>138</sup>See *Grooms v. Fervida*, 396 N.E.2d 405 (Ind. Ct. App. 1979); *Grzesiowski v. State*, 168 Ind. App. 318, 343 N.E.2d 305 (1976).



prior law was for defense attorneys to seek continuances of an arraignment because certain motions had to be made before arraignment and plea, or they would be denied summarily.<sup>139</sup> Seeking to eliminate this practice by avoiding the necessity for it, the new procedure code ties motions to dismiss a criminal charge to the omnibus date, instead of to the date of arraignment and plea.<sup>140</sup> Moreover, a motion to continue the initial hearing normally would be made by an attorney, and the attorney's entry of an appearance, not the initial hearing, would trigger the setting of the omnibus date.<sup>141</sup>

Another question is what consequences would occur if the statutory procedures for initial hearings were not followed. A failure to comply with these procedures should not be a jurisdictional bar to subsequent proceedings.<sup>142</sup> Delay in bringing an arrestee before a magistrate will be a factor in determining whether evidence that was obtained during the detention, such as a confession, will be suppressed as the fruit of an illegal detention.<sup>143</sup> The delay may also result in a civil action for false imprisonment.<sup>144</sup> However, even a "kangaroo" initial hearing will be harmless error if no evidence is obtained as the product of an illegal detention.<sup>145</sup> Furthermore, if a defendant is being illegally detained, his remedy is to seek a writ of habeas corpus.<sup>146</sup>

### C. Omnibus Date

The omnibus date is a relatively new concept in Indiana law,<sup>147</sup> although the statutory authority for setting an "omnibus hearing" date or pre-trial hearing date has existed since 1973.<sup>148</sup> The purpose of the omnibus date is not to provide a date for a hearing but simply to provide a fixed date from which other deadlines in the procedure code are measured.<sup>149</sup> However, the omnibus date is not directly relevant to the setting of a trial date because the date for the trial is deter-

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<sup>139</sup>See IND. CODE § 35-3.1-1-4(b) (Supp. 1981) (repealed 1982).

<sup>140</sup>See *id.* § 35-34-1-4(b) (1982).

<sup>141</sup>See *id.* § 35-36-8-1(a).

<sup>142</sup>See *Sisk v. State*, 232 Ind. 214, 110 N.E.2d 627 (1953); *Treadwell v. State*, 152 Ind. App. 289, 283 N.E.2d 397 (1972).

<sup>143</sup>See *Richey v. State*, 426 N.E.2d 389 (Ind. 1981); *Pawloski v. State*, 269 Ind. 350, 380 N.E.2d 1230 (1978).

<sup>144</sup>See *Harness v. Steele*, 159 Ind. 286, 64 N.E. 875 (1902); *Grooms v. Fervida*, 396 N.E.2d 405 (Ind. Ct. App. 1979).

<sup>145</sup>See *Robinson v. State*, 260 Ind. 517, 297 N.E.2d 409 (1973).

<sup>146</sup>See IND. CODE § 34-1-57-1 (1982); *Glispie v. State*, 412 N.E.2d 234 (Ind. 1980).

<sup>147</sup>Act of May 5, 1981, Pub. L. No. 298, § 5, 1981 Ind. Acts 2314, 2382 (codified at IND. CODE § 35-36-8-1 (1982)).

<sup>148</sup>Act of April 23, 1973, Pub. L. No. 325, § 4, 1973 Ind. Acts 1750, 1794 (repealed 1982). This is now called a pre-trial hearing and is governed by IND. CODE § 35-36-8-3 (1982).

<sup>149</sup>IND. CODE § 35-36-8-1(a) (1982).

mined from the completion date of the *initial hearing* in both felony and misdemeanor cases, unless the defendant in a felony case moves for an early trial under Criminal Rule 4(B), or the parties in a misdemeanor case agree on an earlier date.<sup>150</sup>

In a felony case, within ten days after the first attorney has entered an appearance for the defendant or within twenty days after the completion of the initial hearing, whichever occurs first, the trial court will set an omnibus date and have his clerk notify all counsel of record of the omnibus date.<sup>151</sup> The statute provides:

The omnibus date shall be no earlier than forty-five (45) days, and no later than sixty-five (65) days after the first counsel for the defendant has entered his appearance. If counsel has not entered an appearance on behalf of the defendant, the omnibus date shall be no earlier than fifty-five (55) days, and no later than seventy-five (75) days, after completion of the initial hearing.<sup>152</sup>

This date remains the omnibus date for the felony case until the final disposition of the case, and the trial date is set after the omnibus date but within 140 days after the *initial hearing*,<sup>153</sup> unless the defendant requests an early trial under Criminal Rule 4(B).<sup>154</sup> In a misdemeanor case, the court will set the omnibus date, which will also be the trial date, at the initial hearing, and the date will be "no earlier than thirty (30) days (unless the defendant and the prosecuting attorney agree to an earlier date), and no later than sixty-five (65) days, after the initial hearing."<sup>155</sup> It should be noted that, as in other parts of the procedure code, felony procedures will be followed if even one felony charge is combined with misdemeanor charges.

This statutory scheme for setting the omnibus date may have the effect of delaying the formal appearance of counsel in felony cases. Two hypotheticals will illustrate this effect. In the first hypothetical, defendant *A* is arrested and is immediately released on bond. His initial hearing must be held within twenty days.<sup>156</sup> At the initial hear-

<sup>150</sup>*Id.* §§ 35-36-8-1, -4.

<sup>151</sup>*Id.* § 35-36-8-1(a).

<sup>152</sup>*Id.*

<sup>153</sup>*Id.* § 35-36-8-4.

<sup>154</sup>*See* IND. R. CR. P. 4(B). The code provides:

If a defendant . . . requests a trial within seventy (70) calendar days in accordance with Criminal Rule 4 . . . then the court shall immediately set the case for trial on a date that is within seventy (70) days after the date of the request, and the court shall reset the omnibus date if the omnibus date is beyond the trial date.

IND. CODE § 35-36-8-1(b) (1982).

<sup>155</sup>IND. CODE § 35-36-8-1(c) (1982).

<sup>156</sup>*Id.* §§ 35-33-7-1(2), -4.



ing, he is advised that he has twenty days to retain counsel if he is able to do so.<sup>157</sup> If an attorney has not entered an appearance for the defendant, the court must set the day for determining the omnibus date within twenty days after the initial hearing.<sup>158</sup> If the defendant's attorney enters his appearance on the twentieth day after the initial hearing, the omnibus date will be between forty-five and sixty-five days from the date the appearance was entered.<sup>159</sup> Assuming that the maximum time periods permitted by the new procedure code have been utilized, the omnibus date in this hypothetical will be between eighty-five and one hundred and five days after the defendant's arrest.

In the second hypothetical, defendant *B* is arrested for a felony and is immediately released on bond. His attorney enters an appearance the same day. Now, the time for setting the omnibus date must be within ten days.<sup>160</sup> The court, in the interest of judicial efficiency, probably will set the initial hearing date for the same day on which the omnibus date will be set. Because the omnibus date must be between forty-five days and sixty-five days after the formal appearance of counsel,<sup>161</sup> the omnibus date in this hypothetical will be within fifty-five to seventy-five days after the defendant is arrested. These hypotheticals illustrate that a sixty-day difference in the omnibus date is possible, if there is a delayed entry of appearance of counsel. However, the attorney may be unwise to delay entering an appearance solely to gain more time, especially because the trial date for a felony is set relative to the initial hearing, and not the omnibus date.

The importance of the omnibus date is its effect on the timing for filing motions. Under the new procedure code, the "indictment or information may be amended in matters of substance or form" at any time until thirty days before the omnibus date in a felony case and until fifteen days before the omnibus date in a misdemeanor case.<sup>162</sup> Motions to dismiss a criminal charge based on certain statutory grounds for dismissal must be filed twenty days before the omnibus date in a felony case, and ten days before the omnibus date in a misdemeanor case.<sup>163</sup> Therefore, if a prosecuting attorney waits until thirty days before an omnibus date to amend a charge in a felony case, then

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<sup>157</sup>*Id.* § 35-33-7-5(1)(A).

<sup>158</sup>*Id.* § 35-36-8-1(a)(2).

<sup>159</sup>*Id.* § 35-36-8-1(a). Although the trial court may set an omnibus date before the 20 days have elapsed, it may be wise for the trial court to wait until the end of the defendant's 20-day period for retention of counsel before setting the omnibus date.

<sup>160</sup>*Id.* § 35-36-8-1(a)(1).

<sup>161</sup>*Id.* § 35-36-8-1(a).

<sup>162</sup>IND. CODE § 35-34-1-5(b) (1982).

<sup>163</sup>*Id.* § 35-34-1-4(b). Motions to dismiss based on lack of subject matter jurisdiction may be made at any time and certain specified statutory grounds may be made any time before or during trial. *Id.*

the defense counsel will have only ten days in which to file a motion to dismiss before certain statutory grounds for dismissal will be held to be waived. However, the code does state that "the court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare his defense" when the prosecutor has made an amendment.<sup>164</sup>

Although the omnibus date is supposed to be fixed, it is unclear whether this language in the code would permit the trial court to continue the omnibus date, or whether this language is simply meant to permit a continuance of the trial. Similar language, found in prior Indiana statutes,<sup>165</sup> has been considered primarily in the context of a continuance of a trial date. The Indiana Supreme Court has held that it is within the discretion of the trial court to determine whether such a continuance is necessary, and if the amendment is only minor or technical in nature, the trial court can deny the continuance.<sup>166</sup> Following this line of reasoning, it is likely that the omnibus date is intended to remain fixed, but that the trial date may be continued if the amendment to the criminal charge requires additional time to prepare a defense.

Notice of a defendant's intent to offer an insanity defense<sup>167</sup> or notice of an alibi<sup>168</sup> must be filed within twenty days of the omnibus date in a felony case, and within ten days of the omnibus date in a misdemeanor case. The time period for the prosecutor's response to the defendant's alibi notice is relative to the date of the defendant's notice, not to the omnibus date.<sup>169</sup> As under prior law, the defendant may plead an insanity defense at any time before trial "in the interest of justice and upon a showing of good cause."<sup>170</sup> The court can schedule a pre-trial conference on the omnibus date or on any other date before trial.<sup>171</sup> Motions for change of judge continue to be governed by Criminal Rule 12 and are not linked to the omnibus date.<sup>172</sup>

The concept of an omnibus date is designed to introduce some certainty and streamlining into Indiana criminal procedure, and to avoid endless continuances of pre-trial procedures. However, a flexi-

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<sup>164</sup>*Id.* § 35-34-1-5(d).

<sup>165</sup>*See, e.g.,* IND. CODE § 35-3.1-1-5(d) (Supp. 1981) (repealed 1982).

<sup>166</sup>*E.g.,* *Highsaw v. State*, 269 Ind. 458, 460-61, 381 N.E.2d 470, 471 (1978), *cert. denied*, 442 U.S. 941 (1979); *see Henderson v. State*, 173 Ind. App. 505, 507-08, 364 N.E.2d 175, 177 (1977); *Lemont v. State*, 168 Ind. App. 486, 488, 344 N.E.2d 88, 90 (1976).

<sup>167</sup>*See* IND. CODE § 35-36-2-1 (1982).

<sup>168</sup>*See id.* § 35-36-4-1.

<sup>169</sup>*Id.* § 35-36-4-2(b).

<sup>170</sup>*Id.* § 35-36-2-1.

<sup>171</sup>*Id.* § 35-36-8-3(a).

<sup>172</sup>*Id.* § 35-36-5-1.



ble omnibus date would be not only desirable, but perhaps necessary, when a prosecuting attorney files a felony charge, dismisses it, and then refiles the same charge or additional charges. In this situation, there is a question whether a new initial hearing date and a new omnibus date will be set. This question will be critical when the time periods of Criminal Rule 4(C) are close at hand.<sup>173</sup> When the omnibus date is not less than forty-five days after the appearance of counsel or not less than fifty-five days from the initial hearing, then the omnibus date might place the trial date beyond the periods of Criminal Rule 4(C) and might entitle the defendant to a discharge. If the defendant did not object to the omnibus date being beyond the Criminal Rule 4 time limits, he would waive his right to a discharge.<sup>174</sup> However, if the defendant did object, the trial court would be in a quandary.

A trial court faced with this situation should follow the dictates of Criminal Rule 4 and accelerate the omnibus date to comply with Criminal Rule 4. Because Criminal Rule 4 is designed to implement the constitutional right to a speedy trial and is essentially a matter of procedure, the time periods of Criminal Rule 4 should control when a conflict arises between the setting of an omnibus date and the speedy trial provisions of Criminal Rule 4.<sup>175</sup>

Finally, the fact that the omnibus date sets the time limits for their withdrawal from the case is of importance to defense attorneys. An attorney for an alleged felon may withdraw at any time up to thirty days before the omnibus date, without giving any reason for the withdrawal.<sup>176</sup> However, the trial court must permit counsel to withdraw at *any time* in the event that at least one of the following five situations occur:

- (1) he has a conflict of interest in continued representation of the defendant;<sup>177</sup>
- (2) other counsel has been retained or assigned to defend the case, substitution of new counsel would not cause any delay

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<sup>173</sup>See IND. R. CRIM. P. 4(C); see also *State v. Tharp*, 406 N.E.2d 1242 (Ind. Ct. App. 1980).

<sup>174</sup>See *Arch v. State*, 269 Ind. 450, 381 N.E.2d 465 (1978).

<sup>175</sup>See *State ex rel. Uzelac v. Lake Criminal Court*, 247 Ind. 87, 212 N.E.2d 21 (1965).

<sup>176</sup>IND. CODE § 35-36-8-2(a) (1982).

<sup>177</sup>*Id.* § 35-36-8-2(b)(1). The most commonly occurring potential conflict of interest facing defense attorneys appears to be the representation of co-defendants by one attorney. See, e.g., *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Dean v. State*, 433 N.E.2d 1172 (Ind. 1982); *Ross v. State*, 268 Ind. 608, 377 N.E.2d 634 (1978), *rev'd sub nom. Ross v. Heyne*, 638 F.2d 979 (7th Cir. 1980). However, ethical conflicts that would deny an accused the effective assistance of counsel may arise in other contexts. See, e.g., *Wood v. Georgia*, 450 U.S. 261 (1981); *Cowell v. State*, 416 N.E.2d 839 (Ind. 1981); *Brown v. State*, 385 N.E.2d 1148 (Ind. 1979).

- in the proceedings, and the defendant consents to or requests substitution of the new counsel;<sup>178</sup>
- (3) the attorney-client relationship has deteriorated to a point such that counsel cannot render effective assistance to the defendant;<sup>179</sup>
  - (4) the defendant insists upon representing himself and he understands that the withdrawal of counsel will not be permitted to delay the proceedings;<sup>180</sup> or
  - (5) there is a manifest necessity requiring that counsel withdraw from the case.<sup>181</sup>

The new code also provides that the court may not permit defense counsel to withdraw within thirty days of the omnibus date solely for the reason that the attorney's fee has not been paid.<sup>182</sup>

<sup>178</sup>IND. CODE § 35-36-8-2(b)(2) (1982). Although the defendant has a constitutional right to the assistance of counsel, his right to a particular attorney is not absolute and unqualified. He must exercise his right to select an attorney at an appropriate stage of the proceedings, and the freedom of choice of counsel may not be manipulated to subvert the orderly procedure of the court or to interfere with the fair administration of justice. Therefore, a trial court, in its discretion, may refuse to replace counsel during or immediately before trial, when that substitution would require the court to grant a continuance. *Vacendak v. State*, 431 N.E.2d 100 (Ind. 1982); *Duncan v. State*, 412 N.E.2d 770 (Ind. 1980); *Morgan v. State*, 397 N.E.2d 299 (Ind. Ct. App. 1979).

<sup>179</sup>IND. CODE § 35-36-8-2(b)(3) (1982). Certainly, situations may arise in which there has been a total breakdown in communications between a defendant and his attorney that would render any assistance ineffective by that attorney. However, if a trial court determines that the conflict with the attorney would not unduly affect his representation and the defendant attempts to make a substitution immediately before trial, the court may still deny the substitution. *See Harris v. State*, 427 N.E.2d 658 (Ind. 1981); *Harris v. State*, 416 N.E.2d 902 (Ind. Ct. App. 1981).

<sup>180</sup>IND. CODE § 35-36-8-2(b)(4) (1982). The defendant has a constitutional right to represent himself as long as the choice is made knowingly and intelligently. *Faretta v. California*, 422 U.S. 806 (1975). A trial court must take considerable pains to insure that a defendant understands the dangers of self-representation. *See Phillips v. State*, 433 N.E.2d 800 (Ind. Ct. App. 1982); *Nation v. State*, 426 N.E.2d 436 (Ind. Ct. App. 1981). A trial court might appoint the defendant's former counsel as "standby counsel" when the defendant elects to represent himself, *see German v. State*, 268 Ind. 67, 373 N.E.2d 880 (1978), although there is no constitutional right to hybrid representation. *See Lock v. State*, 403 N.E.2d 1360 (Ind. 1980).

<sup>181</sup>IND. CODE § 35-36-8-2(b)(5) (1982). The term "manifest necessity" is not defined and is probably designed to be vague. It should certainly include situations where the defendant's attorney, or perhaps the attorney's family, is experiencing a serious illness. *Cf. White v. State*, 414 N.E.2d 973 (Ind. Ct. App. 1981) (appellants denied effective assistance of counsel when defense counsel had serious heart trouble before and throughout trial).

<sup>182</sup>IND. CODE § 35-36-8-2(c) (1982). The new procedure code erroneously provides "prior to the waiver date" instead of "prior to the omnibus date." There is no such term as "waiver date" in the new procedure code and the body of this statutory section is obviously tied to the "omnibus date."



*D. Indictments and Informations*

Most of the changes that the new procedure code has made regarding indictments and informations are only minor technical or language changes; however, there are a few changes of importance.<sup>183</sup>

First, the new code provides that a motion to dismiss a criminal charge must be made no later than twenty days prior to the omnibus date in a felony case, or ten days prior to the omnibus date in a misdemeanor case.<sup>184</sup> A motion that is not made within the statutory time period may be denied summarily if: (1) the charge is defective, that is, the charge does not conform substantially with the statutory form of a charge, the allegations demonstrate that the court is without jurisdiction of the crime, or the statute defining the offense is unconstitutional, (2) there is a misjoinder of defendants or duplicitous allegations, (3) the grand jury proceeding was defective, (4) the facts stated do not state the offense with sufficient certainty, or (5) the facts stated do not constitute an offense.<sup>185</sup> A motion to dismiss that is based on the defendant's alleged immunity, on double jeopardy, on a violation of the statute of limitations, on a denial of a speedy trial, on a lack of jurisdiction, or on "any other ground that is a basis for dismissal as a matter of law" may be made or renewed at any time before or during trial.<sup>186</sup> The absence of subject matter jurisdiction may be raised at any time, including after trial.<sup>187</sup>

Under prior law, motions to dismiss that were based upon any of the first five grounds recited above had to be made "prior to arraignment and plea" or the defendant faced summary denial.<sup>188</sup> In practice, this led to the continuances of arraignments and pleas in order to allow for the preparation of motions to dismiss based on those grounds. Now, arraignment is no longer a part of Indiana criminal procedure. Under the new code, the motion to dismiss must be filed twenty days before the omnibus date, which is set in relation to the formal appearance of counsel or the initial hearing.

The procedure code also adds a new ground for a motion to dismiss: "Any other ground that is a basis for dismissal as a matter of law."<sup>189</sup> By its very terms, this provision adds nothing to the law

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<sup>183</sup>The provisions of the new procedure code dealing with indictment and information are codified at IND. CODE §§ 35-34-1-1 to -19 (1982) (previously codified at *id.* §§ 35-3.1-1-1 to -18 (Supp. 1981) (repealed 1982)).

<sup>184</sup>IND. CODE § 35-34-1-4(b) (1982).

<sup>185</sup>*Id.* § 35-34-1-4(a), (b).

<sup>186</sup>*Id.*

<sup>187</sup>*Id.* § 35-34-1-4(b)(2).

<sup>188</sup>*See* IND. CODE § 35-3.1-1-4(b) (Supp. 1981) (repealed 1982).

<sup>189</sup>*Id.* § 35-34-1-4(a)(11) (1982).

because only issues that are already recognized grounds for dismissal are included. The provision is purposely vague, but several generally recognized bases for potential dismissal of charges exist, including enforcement of a plea agreement,<sup>190</sup> selective prosecution,<sup>191</sup> prosecutorial "vindictiveness,"<sup>192</sup> and destruction of material evidence.<sup>193</sup>

Another change is that the new code allows an indictment or information to be amended "in matters of substance or form" at any time up to thirty days before the omnibus date in a felony case, or fifteen days before the omnibus date in a misdemeanor case, upon giving notice to the defendant.<sup>194</sup> Prior law provided that an amendment in a matter of substance had to be made before the arraignment.<sup>195</sup>

A change of equal, if not greater, significance is the repeal of the code section that stated that an indictment or information could never be amended to change the theories of prosecution or to change the identity of the crime charged, and could not be amended after arraignment to cure a legal insufficiency or a failure to state a crime.<sup>196</sup> In a recent case decided under the prior statute, the Indiana Supreme Court criticized the prior statute and stated that, absent these provisions, a party should be able to amend a charge, even as to theory and identity, when the result will not prejudice the defendant's rights.<sup>197</sup> It appears that under the new code, the trial judge apparently will have the discretion to determine whether an amendment prejudices the rights of the defendant.

<sup>190</sup>See *Santobello v. New York*, 404 U.S. 257 (1971); *State v. Groat*, 412 N.E.2d 323 (Ind. Ct. App. 1980).

<sup>191</sup>See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Smith v. State*, 422 N.E.2d 1179 (Ind. 1981); *Lee v. State*, 397 N.E.2d 1047 (Ind. Ct. App. 1979); *Annot.*, 95 A.L.R.3d 280 (1979); 4 A.L.R.3d 404 (1965).

<sup>192</sup>Compare *Cherry v. State*, 414 N.E.2d 301 (Ind. 1981), *cert. denied*, 453 U.S. 946 (1982) with *Bates v. State*, 426 N.E.2d 404 (Ind. 1981) and *Worthington v. State*, 409 N.E.2d 1261 (Ind. Ct. App. 1980); compare *Blackledge v. Perry*, 417 U.S. 21 (1974) with *United States v. Goodwin*, 102 S. Ct. 2485 (1982).

<sup>193</sup>The negligent or intentional destruction or withholding of material evidence by the police or prosecutor may deny a defendant due process and be reversible error. See *Birkla v. State*, 263 Ind. 37, 42, 323 N.E.2d 645, 648, *cert. denied*, 423 U.S. 853 (1975); *Cox v. State*, 422 N.E.2d 357, 364 (Ind. Ct. App. 1981); *Ortez v. State*, 165 Ind. App. 678, 684, 333 N.E.2d 838, 841 (1975). "The burden of proving materiality is on the defendant unless it is self-evident or unless such a showing is prevented by the destruction of the evidence itself." *Cox v. State*, 422 N.E.2d at 364. However, if the defendant claims that a sloppy police investigation led to suppression of evidence he must be able to point to specific evidence that was lost or destroyed. See *Rowan v. State*, 431 N.E.2d 805, 819 (Ind. 1982). *Cf. Schutz v. State*, 413 N.E.2d 913, 916 (Ind. 1981) ("[t]he defense has ample opportunity to correct any such omission through independent investigations, depositions and cross-examination").

<sup>194</sup>IND. CODE § 35-34-1-5(b) (1982).

<sup>195</sup>See *id.* § 35-3.1-1-5(b) (Supp. 1981) (repealed 1982).

<sup>196</sup>*Id.* § 35-3.1-1-5(e).

<sup>197</sup>*Trotter v. State*, 429 N.E.2d 637, 640-41 (Ind. 1981).



Under the new code, amendments of "substance"<sup>198</sup> can be made up to thirty days prior to an omnibus date in a felony case. Immaterial defects or a defect "which does not prejudice the substantial right of the defendant"<sup>199</sup> can be amended at any time and the trial court may permit a continuance to enable the defendant to prepare his defense to this kind of amendment.<sup>200</sup> Therefore, it is difficult to see how the defendant could be seriously prejudiced in the preparation of his defense by the amendment of the criminal charges under the new code.

### *E. Public Trial—Closure*

The law concerning public and press access to criminal proceedings has developed rapidly in the courts these past few years.<sup>201</sup> This year, the Indiana legislature has enacted legislation, which became effective September 1, 1982, that is designed to regulate public access to criminal proceedings.<sup>202</sup>

The law declares that criminal proceedings are presumptively open to attendance by the general public.<sup>203</sup> The term "criminal proceeding" is defined to mean the court proceedings in a criminal action that occur after the arrest of an accused and before any appeal is commenced.<sup>204</sup> Criminal proceedings do not include jury deliberations, omnibus hearings, except when witnesses are sworn in and their testimony is taken, or "any proceeding in which rights of attendance by the general public are otherwise specifically governed by statute or rules of procedure."<sup>205</sup> Because there is a requirement for grand jury secrecy, the public will not have access to grand jury proceedings.<sup>206</sup> Juvenile proceedings have their own secrecy provisions and are not generally considered criminal proceedings.<sup>207</sup> The public will not have access to discovery depositions<sup>208</sup> because they are not

<sup>198</sup>"Matters of substance" versus "matters of form" can be confused, sometimes, as changing the "identity of the offense" or "theory of the prosecution." See *Henderson v. State*, 403 N.E.2d 1088 (Ind. 1980); *Evans v. State*, 393 N.E.2d 246 (Ind. Ct. App. 1979).

<sup>199</sup>IND. CODE § 35-34-1-5(a)(9) (1982).

<sup>200</sup>*Id.* § 35-34-1-5(a), (d).

<sup>201</sup>See, e.g., *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *State ex rel. Post-Tribune Publishing Co. v. Porter Superior Court*, 412 N.E.2d 748 (Ind. 1980).

<sup>202</sup>Act of Feb. 24, 1982, Pub. L. No. 40, § 1, 1982 Ind. Acts 432 (codified at IND. CODE §§ 5-14-2-1 to -10 (1982)).

<sup>203</sup>IND. CODE § 5-14-2-2 (1982).

<sup>204</sup>*Id.* § 5-14-2-1.

<sup>205</sup>See *id.*

<sup>206</sup>*Id.* §§ 35-34-2-4(i), 35-34-2-10.

<sup>207</sup>See *id.* § 31-6-7-10(b).

<sup>208</sup>See *id.* § 31-6-7-11.

really court proceedings.<sup>209</sup> The public also would not be entitled to be present at the obtaining of a search or arrest warrant, even if the warrant were based on oral testimony, because a criminal proceeding does not arise until after the accused is arrested. However, proceedings such as a bail hearing, an initial hearing, or a suppression hearing would probably fall within the definition of the term "criminal proceeding."

The new statute provides that no court may order the exclusion of the "general public"<sup>210</sup> from a criminal proceeding, or any part of a criminal proceeding, unless the court first affords the parties and general public a "meaningful opportunity to be heard."<sup>211</sup> Whenever exclusion or closure is sought, the court must set a hearing date sufficiently in advance so that the parties and the general public can prepare their pleadings and evidence and can have an opportunity to file briefs on the proposed exclusion order.<sup>212</sup> Depending upon when a motion for exclusion is filed, this statutory provision may require a continuance of the trial date so that a hearing on the exclusion motion can be held. Nevertheless, the statute does state that "[t]he time for the hearing date shall not be extended, however, so that it imposes an unreasonable delay under the circumstances of the case."<sup>213</sup>

#### F. Crimes

The next sections of this Survey Article will touch briefly on some of the major cases decided by Indiana appellate courts during the survey period. Additionally, new criminal statutes that are relevant to these major cases will be discussed, including some portions of the new procedure code which were not discussed earlier.

Several major decisions were handed down during the past survey period which clarified the definition of certain offenses under the 1977 penal code and discussed some of the basic principles of criminal law. In *Markley v. State*,<sup>214</sup> the defendant, who was charged with battery as a Class C felony, argued that the State failed to prove that he intentionally or knowingly inflicted serious bodily injury. The battery statute provides that a person who knowingly or intentionally touches another in a rude, insolent, or angry manner commits a battery; a Class C felony is committed if the touching results in serious bodily

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<sup>209</sup>See *United States v. United Shoe Machinery Co.*, 198 F. 870 (D. Mass. 1912).

<sup>210</sup>The term "general public" is defined to mean "any individual or group of individuals, but does not include the parties to the criminal action." IND. CODE § 5-14-2-1 (1982).

<sup>211</sup>*Id.* § 5-14-2-3.

<sup>212</sup>*Id.* § 5-14-2-4.

<sup>213</sup>*Id.*

<sup>214</sup>421 N.E.2d 20 (Ind. Ct. App. 1981).



injury.<sup>215</sup> The basic culpability statute in the penal code provides that if a kind of culpability is required for the commission of an offense, that same culpability is required with respect to every material element of the prohibited conduct.<sup>216</sup> To elevate the battery offense to a Class C felony, the defendant in *Markley* argued that the state must prove that serious bodily injury was intentionally and knowingly inflicted because "serious bodily injury" is an element of the crime. The court of appeals, however, concluded that it need not be shown that the defendant intentionally or knowingly inflicted serious bodily injury.<sup>217</sup> The court stated that the terms "prohibited conduct" and "element" in the culpability statute are not synonymous. Consequently, the court found that proof of serious bodily injury, if proven beyond a reasonable doubt, enhances the penalty for battery, but no proof of culpability is required with respect to this element.<sup>218</sup>

This decision was reinforced by the fact that the battery statute itself did not require that the result of the battery be intended. It was only the rude, insolent, or angry touching which had to be committed intentionally or knowingly. As many of the crimes in the penal code provide for an enhanced penalty if the crime is committed while armed or if serious bodily injury results from the crime, it is important to remember the decision in *Markley*, which held that the aggravating circumstances need not be committed knowingly, intentionally, or recklessly.<sup>219</sup>

In *Swafford v. State*,<sup>220</sup> the Indiana Supreme Court adopted "brain death" as an additional definition of death in homicide cases. The victim in *Swafford* was shot in the back of the head, with the bullet lodging near the center of the brain, close to the brain stem. Concerned by the bullet's close proximity to the brain stem, the neurological surgeons decided to defer any operation unless the victim's condition deteriorated. The next night, the victim's heartbeat and respiration stopped, his pupils became fixed and dilated, and he turned blue. Resuscitative efforts restored the victim's heartbeat and respiration, and the victim was placed on a mechanical ventilator.

The next day, the neurosurgeons made a preliminary diagnosis that the victim's brain had died. The victim no longer responded to painful external stimuli, and his spontaneous movements had ceased. Two blood flow studies revealed no arterial flow of blood to the brain.

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<sup>215</sup>IND. CODE § 35-42-2-1(3) (Supp. 1979) (amended 1981 and currently codified at *id.* § 35-42-2-1(3) (1982)).

<sup>216</sup>*Id.* § 35-41-2-2(d) (1982).

<sup>217</sup>421 N.E.2d at 21.

<sup>218</sup>*Id.*

<sup>219</sup>See also *Carty v. State*, 421 N.E.2d 1151, 1155 (Ind. Ct. App. 1981).

<sup>220</sup>421 N.E.2d 596 (Ind. 1981).

Based upon these factors, the neurosurgeons concluded that the victim had suffered irreversible cessation of all brain functions. After consulting with family members, a neurosurgeon formally declared the victim dead. The immediate cause of death listed on the death certificate was "brain death" caused by a gunshot wound to the head. At the time he was formally declared dead, the victim's heartbeat and respiration were being sustained by the mechanical ventilator. However, there was no evidence in the record regarding the withdrawal from the ventilator or the cessation of the victim's heartbeat and respiration.

At trial, the medical experts, including the neurosurgeon who declared the victim's death, defined brain death in terms of certain clinical criteria that have been set forth by a committee at Harvard Medical School.<sup>221</sup> The neurosurgeon also testified concerning his two confirmatory blood flow studies. The trial court then instructed the jury that brain death could be considered death for the purposes of the homicide statute.<sup>222</sup>

On appeal, the defendant argued that the evidence was insufficient to prove that the victim had "died" because death is legally defined as the cessation of heartbeat and respiration; the defendant also challenged the trial court's instruction on brain death. The supreme court noted that no Indiana statute or judicial decree had ever defined death. The defendant contended that the only acceptable definition of death was that found in the fourth edition of *Black's Law Dictionary*, which defines death as the stoppage of the circulation of the blood and a cessation of vital functions such as respiration.<sup>223</sup> The defendant argued that any other definition would constitute a retroactive application of a new statutory construction, violating due process. The supreme court rejected the defendant's position, stating that it

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<sup>221</sup>The court set forth the Harvard criteria as: "(1) a total lack of responsivity to externally applied stimuli (e.g., pinching) and inner need; (2) no spontaneous muscular movements or respiration; and (3) no reflexes, as measured by a fixed, dilated pupil and lack of ocular, pharyngeal, and muscle-tendon reflexes." 421 N.E.2d at 600. The Harvard Committee also emphasized that a "flat" electroencephalogram reading when conducted at 24-hour intervals would have great confirmatory value. See Ad Hoc Committee of the Harvard Medical School to Examine the Definition of Brain Death, *A Definition of Irreversible Coma*, 205 J. A.M.A. 337 (1968).

<sup>222</sup>The instruction read to the jury was as follows:

If you find beyond a reasonable doubt that William Robinson had suffered brain death before he was removed from the respirator, then the state has satisfied the essential element of the crime of murder requiring proof beyond a reasonable doubt of the death of the victim. Brain death occurs when, in the opinion of a licensed physician, based on accepted medical standards, there has been a total and irreversible cessation of spontaneous brain functions and further attempts at resuscitation or continued supportive maintenance would not be successful in restoring such functions.

421 N.E.2d at 598 n.1.

<sup>223</sup>See BLACK'S LAW DICTIONARY 488 (4th ed. 1968).



would have had some validity only if the definition in Black's had been derived from common law or from the statutes of England before 1607.<sup>224</sup> The supreme court also noted that the definition of death found in the fifth edition of *Black's Law Dictionary*, which was published prior to the events of this case, included a definition of death based primarily on "brain death."<sup>225</sup>

The defendant further argued that, even if brain death is recognized as death by a consensus of the medical community, the legislature, not the court, must be the ones to adopt brain death as a legal definition of death. Though the court encouraged the legislature to adopt a statutory definition of death, the court declared that "we are unable to ignore the advances made in medical science and technology during the last two decades."<sup>226</sup> Accordingly, the court stated:

Lest any confusion result, we recognize the following definition of death for purposes of the law of homicide: An individual who has sustained either (1) *irreversible cessation of circulatory and respiratory functions*, or (2) *irreversible cessation of total brain functions*, is dead. A determination of death must be made in accordance with accepted medical standards.<sup>227</sup>

Based upon this definition of death, the court found that the evidence was sufficient to prove that the victim had died. The court also resolved another interesting question that arose in this case. To be responsible for the death of a person, the defendant must inflict injuries which contribute either mediately or immediately to death.<sup>228</sup> There was no evidence regarding the withdrawal of the ventilator in this case; however, the court stated that the performance of the autopsy and the medical opinion that the gunshot wound caused brain death were sufficient to prove that the defendant's actions were the cause of the victim's death.<sup>229</sup>

The interpretations of criminal recklessness by the Indiana courts have continued to supply interesting decisions during the survey period.<sup>230</sup> In *Williams v. State*,<sup>231</sup> the Indiana Supreme Court, by a three-

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<sup>224</sup>421 N.E.2d at 598 (citing IND. CODE § 1-1-2-1 (1982)).

<sup>225</sup>BLACK'S LAW DICTIONARY 170 (5th ed. 1979).

<sup>226</sup>421 N.E.2d at 602.

<sup>227</sup>*Id.* (citations omitted) (emphasis in original).

<sup>228</sup>*Id.* (citing *Bivans v. State*, 254 Ind. 184, 258 N.E.2d 644 (1970); *Reed v. State*, 387 N.E.2d 82 (Ind. Ct. App. 1979)).

<sup>229</sup>421 N.E.2d at 602.

<sup>230</sup>*See Hergenrother v. State*, 425 N.E.2d 225 (Ind. Ct. App. 1981) (intentional crossing of center line held sufficient to support conviction for reckless homicide); *Salrin v. State*, 419 N.E.2d 1351 (Ind. Ct. App. 1981) (swerving across the center line twice and driving while intoxicated held sufficient to support conviction for reckless homicide).

<sup>231</sup>423 N.E.2d 598 (Ind.), *rev'g* 415 N.E.2d 118 (Ind. Ct. App. 1981). For a discussion

two majority, reversed the court of appeals' decision that had convicted the defendant truckdriver of criminal recklessness for striking a bicyclist, based upon evidence of the truckdriver's intoxicated state. Although the supreme court's reversal was based in part upon the admission of a confession that the majority held the State failed to prove was voluntary, the court held that the evidence presented to prove criminal recklessness was insufficient.<sup>232</sup> The majority opinion said that, while evidence of intoxication could be considered in determining recklessness, intoxication alone was insufficient to prove recklessness.<sup>233</sup>

In determining what evidence was sufficient to establish criminal recklessness, the majority in *Williams* relied upon a prior supreme court decision, *DeVaney v. State*.<sup>234</sup> In *DeVaney*, a pre-penal code case, the defendant had been convicted of both reckless homicide and causing the death of another while driving under the influence of intoxicating liquor. At the time of the *DeVaney* case, both the crimes of reckless homicide and causing death while driving under the influence were contained in the same statute.<sup>235</sup> In dismissing the charge for reckless homicide, the supreme court in *DeVaney* found that the evidence showing that the defendant driver crossed the center line of the road and was intoxicated was not sufficient to sustain a conviction of reckless homicide; however, the court allowed the defendant's conviction for causing the death while driving intoxicated to stand.<sup>236</sup> The *DeVaney* court's decision rested upon its interpretation of the statute that contained both of these crimes, noting that if the same evidence would result in a conviction for both crimes, then it would be superfluous for a statute to have two provisions punishing identical conduct in the same way.<sup>237</sup>

The dissent in *Williams v. State* disagreed with the majority's reliance on *DeVaney*. Chief Justice Givan, joined by Justice Pivarnik, dissented, stating that the rationale behind the decision in *DeVaney* was that the defendant would have been convicted of two crimes for one offense if the convictions for both reckless homicide and driving under the influence had been sustained.<sup>238</sup> Because *Williams* had been convicted only of criminal recklessness, *DeVaney* was inapplicable to the facts in *Williams*.<sup>239</sup>

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of the appellate court's decision, see Lidke, *Criminal Law and Procedure, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 159, 173-74 (1982).

<sup>232</sup>423 N.E.2d at 600.

<sup>233</sup>*Id.*

<sup>234</sup>259 Ind. 483, 288 N.E.2d 732 (1972).

<sup>235</sup>See IND. CODE § 9-4-1-54 (1976) (amended 1978).

<sup>236</sup>249 Ind. at 494, 288 N.E.2d at 739.

<sup>237</sup>*Id.* at 493, 288 N.E.2d at 738.

<sup>238</sup>423 N.E.2d at 600.

<sup>239</sup>*Id.*



In addition to the applicability of *DeVaney*, the strict standard set by the majority opinion in the supreme court's decision in *Williams* is questionable. By statute, "a person engages in conduct 'recklessly' if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct."<sup>240</sup> Driving while intoxicated may not always meet this statutory requirement, and at lower levels of intoxication, it might be wise to require some evidence in addition to intoxication to show criminal recklessness. However, the blood alcohol level of the driver in *Williams* was .37 percent, and such a high blood alcohol level should meet the statutory definition of recklessness.

In a recent appellate case, the defendant attempted to assert a novel defense to a crime. In *State v. Dively*,<sup>241</sup> the defendant was charged with breaking and entering into her husband's tavern with the intent to commit the felony of theft. Although the defendant and her husband were separated at the time of the alleged offense, the defendant claimed interspousal immunity from prosecution for the theft. The State proved that the tavern and its contents were the separate property of the husband and that the wife had no interest in that property. The trial court, however, dismissed the charge on grounds of interspousal immunity, and the State appealed.

The court of appeals rejected the common law "unity theory" that a husband and wife could not commit crimes against the property of the other and ruled that interspousal immunity did not bar the defendant's prosecution.<sup>242</sup> The court noted the statutory exceptions to the common law unity theory included in the Married Woman's Act,<sup>243</sup> which was enacted to protect the property rights of a married woman. The court then noted case law exceptions to interspousal immunity. The court cited two early arson cases where, in each case, one spouse burned the property of the other spouse and was held to have committed arson.<sup>244</sup> The court also cited a larceny case which held that a husband cohabiting with his wife could be found guilty of larceny of her separate property.<sup>245</sup> The court in *Dively* stated that the 1977 penal code did not intend to change these principles. Thus, the court refused to hold that, as a matter of law, a person could not commit an offense against the property of his or her spouse.<sup>246</sup>

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<sup>240</sup>IND. CODE § 35-41-2-2(c) (1982).

<sup>241</sup>431 N.E.2d 540 (Ind. Ct. App. 1982).

<sup>242</sup>*Id.* at 543.

<sup>243</sup>IND. CODE §§ 31-1-9-1 to -16 (1982).

<sup>244</sup>*See* *Jordan v. State*, 142 Ind. 422, 41 N.E. 817 (1895); *Garrett v. State*, 109 Ind. 527, 10 N.E. 570 (1886).

<sup>245</sup>*See* *Beasley v. State*, 138 Ind. 552, 38 N.E. 35 (1894).

<sup>246</sup>431 N.E.2d at 543. Specifically, the court stated that:

We conclude that the mere fact of conjugal status does not preclude a spouse

In *Hill v. State*,<sup>247</sup> the Indiana Supreme Court construed the robbery statute. In *Hill*, the defendant robbed a taxicab driver named Williamson. Williamson began chasing the defendant and was joined in the chase by a passer-by, Bartlett. Bartlett grabbed the defendant and wrestled him to the ground. The defendant struck Bartlett on the head with a toy gun, inflicting a small laceration, for which Bartlett did not seek medical attention. The defendant was convicted of robbery as a Class A felony.

The supreme court reversed the Class A felony conviction and remanded the case for sentencing on a Class C charge.<sup>248</sup> The court cited the statute which defined a robbery as a Class A felony when "it results in either bodily injury or serious bodily injury to any other person."<sup>249</sup> Citing its opinion in *Clay v. State*,<sup>250</sup> the court construed this statute to mean that robbery is a Class A felony only when bodily injury is inflicted on the victim of the robbery or when serious bodily injury is inflicted on any other person. Because Bartlett clearly did not suffer serious bodily injury, the supreme court held that Bartlett's injury could not be the basis for a finding of guilt on a Class A charge.<sup>251</sup>

This particular section of the robbery statute was amended this year so that the statute now reads that robbery is a Class A felony if it "results in either bodily injury or serious bodily injury to any person *other than a defendant*."<sup>252</sup> If the legislature intended to alleviate the *Hill* problem by the amendment, it did not appear to succeed. Adding the phrase "other than a defendant" does not really change the supreme court's interpretation of the robbery statute in *Hill*.

In *State v. Gillespie*,<sup>253</sup> the Indiana appellate court faced another

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as a matter of law from committing an offense, including burglary, against the separate property of his or her spouse. We do not believe that the mere existence of the marriage relationship puts a spouse's separate property beyond the protection of the law and subject to the depredation of the other spouse. We recognize that circumstances may exist in particular cases which, as a matter of fact, will prevent an entry by a spouse into the spouse's separate property from amounting to a burglary because the act may be the result of express or implied permission.

*Id.*

<sup>247</sup>424 N.E.2d 999 (Ind. 1981).

<sup>248</sup>*Id.* at 1000.

<sup>249</sup>IND. CODE § 35-42-5-1 (1976) (amended 1982). "Bodily injury" is defined as "any impairment of physical condition, including physical pain," and "[s]erious bodily injury" is defined as "bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ." *Id.* § 35-41-1-2 (1982).

<sup>250</sup>416 N.E.2d 842 (Ind. 1981).

<sup>251</sup>424 N.E.2d at 1000.

<sup>252</sup>IND. CODE § 35-42-5-1 (1982) (emphasis added).

<sup>253</sup>428 N.E.2d 1338 (Ind. Ct. App. 1981).



question that was resolved subsequently by recent legislation. In that case, the defendant was charged with attempted dealing of a controlled substance, heroin. It was stipulated by the parties that the substance delivered was crushed common aspirin, and the defendant filed a motion to dismiss. At the hearing on the motion to dismiss, the defendant presented evidence that he had decided to teach an undercover police officer a lesson; thus, the defendant crushed some aspirin, placed it in a foil packet, and sold it to the undercover officer for \$110. The trial court dismissed the information, relying on the decision of the Court of Appeals for the Fifth Circuit in *United States v. Oviedo*,<sup>254</sup> which was decided primarily on the common law defense of impossibility. In *Gillespie*, the court of appeals stated that the Indiana Legislature has expressly rejected this type of impossibility defense.<sup>255</sup> Under the relevant statute as it existed at the time, the fact that an uncontrolled substance was delivered, standing alone, would not preclude a charge of attempted delivery.<sup>256</sup> Therefore, the court held that the charging information was sufficient to withstand a motion to dismiss, even with the stipulation that the substance was aspirin.<sup>257</sup> However, the court of appeals agreed that, if the defendant's mens rea was such that he intended to deliver aspirin, the defendant could not be found guilty of the attempted delivery of heroin. Because the defendant's "intent" was not stipulated, this was properly an issue for the trier of fact.

Subsequent to the decision in *Gillespie*, the Indiana legislature enacted legislation to remedy the gap in the law that was noted by the court in *Gillespie*. The new statutory provision makes it a Class D felony to knowingly or intentionally deliver any substance that one represents to be a controlled substance.<sup>258</sup>

### G. Search and Seizure

Several of the more interesting search and seizure cases in the past year involved the waiver of search and seizure rights by juveniles. In *Williams v. State*,<sup>259</sup> the supreme court considered the admissibil-

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<sup>254</sup>525 F.2d 881 (5th Cir. 1976). The Fifth Circuit reversed the conviction in *Oviedo*, where a defendant believed he was delivering heroin but in fact delivered procaine hydrochloride, an uncontrolled substance, because the objective acts performed by the defendant must mark the defendant's conduct as criminal. *But cf.* *United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978) (defendant can be convicted of attempted distribution of cocaine even though the substance he offered to sell was a noncontrolled substance).

<sup>255</sup>428 N.E.2d at 1339 (citing IND. CODE § 35-41-5-1(b) (1982)).

<sup>256</sup>See IND. CODE § 35-48-4-2 (Supp. 1979) (amended 1981).

<sup>257</sup>428 N.E.2d at 1340.

<sup>258</sup>See Act of April 13, 1981, Pub. L. No. 305, § 1, 1981 Ind. Acts 2402 (emphasis added) (codified at IND. CODE § 35-48-4-4.5 (1982)).

<sup>259</sup>433 N.E.2d 769 (Ind. 1982).

ity of certain evidence that was obtained in a search consented to by the defendant's juvenile half-brother. Although the court found that the juvenile's waiver was invalid and the evidence thus improperly admitted, the court upheld the defendant's conviction of attempted murder.<sup>260</sup>

In this case, after receiving information of a shooting and the victim's description of the defendant who was wounded in the exchange of gunfire, the police located the defendant at a local hospital. Upon arriving at the hospital, a police officer encountered the defendant's seventeen-year-old half-brother, Billingsley, in the emergency room area. Billingsley, who had driven the defendant to the hospital, was arrested and transported to the police station. In the presence of his father, Billingsley was questioned by the police. Billingsley told the police that Williams said he had shot himself with a handgun and that Williams had asked Billingsley to place the gun under a sofa cushion in the apartment which the two shared. With his father present, Billingsley was informed of his rights as a juvenile, and then Billingsley executed a standard consent to search form. After receiving the consent to search, the police went to the apartment and seized the handgun, which contained four bullets and a spent shell casing.

The Indiana Supreme Court initially determined that Billingsley had authority to consent to the search of the apartment.<sup>261</sup> The more difficult question for the court was whether Billingsley was afforded an opportunity for a "meaningful consultation" with his father before waiving his rights and giving his consent to the search. This issue was premised on Indiana Code section 31-6-7-3(a)(2)(C) which provides that "any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only: . . . (2) by the child's custodial parent, guardian, custodian or guardian ad litem if: . . . (C) meaningful consultation has occurred between that person and the child."<sup>262</sup> This section of the Indiana Juvenile Code imposes the "meaningful consultation" requirement on a juvenile's waiver of any constitutional or statutory right and is designed to codify Indiana case law regarding the waiver of rights by juveniles.<sup>263</sup> However, the juvenile waiver cases, prior to the enactment of the juvenile code in 1979, dealt with the waiver of rights before giving a confession or an incriminating statement.

Relying on cases decided before the enactment of the new juvenile code,<sup>264</sup> the court in *Williams* said that the State bears a heavy burden

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<sup>260</sup>*Id.* at 771.

<sup>261</sup>*Id.*

<sup>262</sup>IND. CODE § 31-6-7-3(a) (1982).

<sup>263</sup>IND. CODE ANN. § 31-6-7-3 commentary at 303 (West 1979).

<sup>264</sup>*See, e.g.,* *Bluitt v. State*, 269 Ind. 438, 381 N.E.2d 458 (1978).



of proving the requirement of meaningful consultation. The court found that, in this case, the State had failed to meet this heavy burden because there was no evidence that the atmosphere surrounding the questioning of Billingsley was "free of the inherently coercive nature normally present in custodial surroundings."<sup>265</sup> Also, there was no evidence that any consultation occurred between Billingsley and his father, or that Billingsley waived the right to a meaningful consultation.<sup>266</sup>

As a consequence of the court's finding that the waiver was ineffective, the gun and bullets that were found during the unconsented search were improperly admitted into evidence.<sup>267</sup> Despite this failure to comply with the juvenile code, the supreme court concluded that, because of the unequivocal identification of Williams by the victim, the error was harmless beyond a reasonable doubt<sup>268</sup> under the decision of *Chapman v. California*.<sup>269</sup>

In addition to the specific holding in *Williams*, there are several interesting aspects to the case. First, Williams was asserting the violation of the juvenile rights of another person to seek the exclusion of evidence from his trial. Second, the Indiana Supreme Court relied on cases decided before the juvenile code was enacted to construe the meaningful consultation requirement in the statute. This reliance is reasonable because the statute is essentially a codification of prior case law. However, the court commented in a footnote that the statutory provision might preempt a prior case law determination that a lack of meaningful consultation or opportunity for such consultation might not render a waiver of rights invalid per se.<sup>270</sup> By this admonition, the court suggests that much of the case law concerning juvenile matters developed before the enactment of the juvenile code could be eradicated by the juvenile code.<sup>271</sup> If this occurred, it would be unfortunate because the court has developed reasonable exceptions to the juvenile waiver requirements. For example, when a suspect tells the police that he is over eighteen years of age and, relying on that representation, the police do not follow juvenile waiver standards, the

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<sup>265</sup>433 N.E.2d at 773.

<sup>266</sup>A juvenile is permitted by statute to waive the right to meaningful consultation with his parent if the waiver is made in the presence of the parent and is made knowingly and voluntarily. IND. CODE § 31-6-7-3(b) (1982). As the supreme court in *Williams* noted, this engrafted a new provision regarding the waiver of juvenile rights, on the court's decision in *Lewis v. State*, 259 Ind. 431, 288 N.E.2d 138 (1972). 433 N.E.2d at 772.

<sup>267</sup>433 N.E.2d at 773.

<sup>268</sup>*Id.*

<sup>269</sup>386 U.S. 18 (1967).

<sup>270</sup>*See* 433 N.E.2d at 772 n.1.

<sup>271</sup>*See also* IND. CODE ANN. § 31-6-7-3 commentary at 303 (West 1979).

court has held that a confession is still admissible.<sup>272</sup> Whether the solidifying of juvenile waiver requirements in a statute will stultify the development of common sense exceptions remains to be seen.

Another juvenile case involving the waiver of rights is *Deckard v. State*.<sup>273</sup> The facts in *Deckard* indicated that a juvenile, Moore, was temporarily residing at the defendant's house trailer. Moore had previously signed a waiver of his fourth amendment rights as a condition of probation after an informal delinquency determination. Moore's mother and his probation officer were present when Moore signed the waiver, but Moore's mother did not sign it. Utilizing Moore's waiver, the police searched the defendant's house trailer and discovered marijuana. The court of appeals held that the waiver was not properly executed under the juvenile code because the mother, though present, did not sign the waiver.<sup>274</sup>

In *Chambers v. State*,<sup>275</sup> the Indiana Supreme Court made an interesting distinction between two earlier Indiana court of appeals' decisions and this case, in which the court upheld the conviction for rape, robbery, and confinement. After the defendant in this case had raped the victim, the defendant had removed the victim's military identification card. Subsequently, the victim received several telephone calls from the defendant. After the police had arrested the defendant,<sup>276</sup> they took him to the police station. There the defendant was asked to surrender the contents of his pockets. The police received the defendant's wallet and began to look through it for the victim's military identification card. The police did not find the identification card but did find a piece of paper with the victim's name, telephone number, and address on it. This evidence was admitted at trial.

On appeal, the defendant argued that the search was illegal and relied on two earlier court of appeals' cases, *Bradford v. State*<sup>277</sup> and *Johnson v. State*,<sup>278</sup> both of which involved the search of women's handbags. However, the Indiana Supreme Court unanimously held that a man's wallet is distinguishable from a lady's handbag.<sup>279</sup> The court said that *Bradford* and *Johnson* were more similar to *United States v. Chadwick*,<sup>280</sup> because *Chadwick* concerned luggage or other personal

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<sup>272</sup>See *Stone v. State*, 268 Ind. 672, 377 N.E.2d 1372 (1978).

<sup>273</sup>425 N.E.2d 256 (Ind. Ct. App. 1981).

<sup>274</sup>*Id.* at 257. See IND. CODE § 31-6-7-3(a)(2) (1982). The court also held that the search exceeded the scope of the waiver. 425 N.E.2d at 257.

<sup>275</sup>422 N.E.2d 1198 (Ind. 1981).

<sup>276</sup>The identification procedure utilized in this case makes the case worth reading for that reason alone.

<sup>277</sup>401 N.E.2d 77 (Ind. Ct. App. 1980).

<sup>278</sup>413 N.E.2d 335 (Ind. Ct. App. 1980).

<sup>279</sup>422 N.E.2d at 1202.

<sup>280</sup>433 U.S. 1 (1977).



property “‘not immediately associated with the person of the arrestee.’”<sup>281</sup> The Indiana Supreme Court was aided in this decision by a seventh circuit case,<sup>282</sup> which had made a similar distinction. In other words, the court in *Chambers* concluded that a woman’s handbag was like luggage, requiring a warrant to search it once the luggage had been reduced to the custody of the police, but the search of a man’s wallet can be conducted without a warrant because it is really a search of a part of his person.

The defendant also contended that the search of his wallet was not truly a search incident to arrest because he was not ordered to empty his pockets when he was first arrested. The court held, nonetheless, that the search of the wallet after the defendant had been transported to the police station “does not alter the fact that the search was incident to the arrest.”<sup>283</sup>

#### H. Plea Bargaining—Guilty Pleas

In last year’s Survey,<sup>284</sup> there was a discussion of the leading case of *Goldsmith v. Marion County Superior Court*.<sup>285</sup> In *Goldsmith*, the Indiana Supreme Court clearly declared that a plea agreement between a prosecuting attorney and a criminal defendant that has been accepted by the trial court is binding.<sup>286</sup> Shortly after the supreme court’s decision, the court of appeals handed down a trio of cases that elaborated upon the *Goldsmith* decision.

In *Dolan v. State*,<sup>287</sup> the defendant was charged with uttering a forged prescription, while he was on probation for a prior conviction of the same type of offense. The defendant pleaded guilty, and the trial court accepted the parties’ plea agreement that provided for a three-year sentence for the defendant’s previous violation and an additional four-year sentence for the present charge, with the two sentences to be served consecutively. On appeal, one of the arguments raised by the defendant was that the trial court erred in not entering on the record the reasons for increasing the two-year presumptive sentence on the forged prescription charge to the maximum allowable sentence of four years. The defendant contended that the

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<sup>281</sup>422 N.E.2d at 1203 (quoting *United States v. Chadwick*, 433 U.S. 1, 15 (1977)).

<sup>282</sup>*United States v. Berry*, 560 F.2d 861 (7th Cir. 1977), *vacated on other grounds*, 571 F.2d 2 (7th Cir.), *cert. denied*, 439 U.S. 840 (1978).

<sup>283</sup>422 N.E.2d at 1203.

<sup>284</sup>*Lidke, Criminal Law and Procedure, 1981 Survey of Recent Developments in Indiana Law*, 15 IND. L. REV. 159, 163 (1982).

<sup>285</sup>419 N.E.2d 109 (Ind. 1981).

<sup>286</sup>*Id.* at 114. The pertinent statutes on plea agreements under present law are IND. CODE §§ 35-35-3-1 to -7 (1982).

<sup>287</sup>420 N.E.2d 1364 (Ind. Ct. App. 1981).

statute required the trial record to include the aggravating circumstances that precipitated the imposition of the maximum sentence.<sup>288</sup>

The court of appeals noted that a trial court is required by statute to list "the aggravating and mitigating circumstances" that influence its choice of sentence.<sup>289</sup> However, the court found that the trial court must recite its reasons for giving an enhanced sentence above the presumptive sentence only when the court is exercising its discretion in sentencing.<sup>290</sup> In *Dolan*, the trial court had the discretion to either accept or reject the plea agreement. Relying on *Goldsmith*, the court in *Dolan* stated that once the trial court had exercised its discretion and accepted the plea agreement, then the court was bound.<sup>291</sup> Once the trial court was bound to impose the sentence in the plea agreement, the court of appeals in *Dolan* stated that "the only facts and circumstances relevant to the issue of the defendant's sentence are the terms of the agreement."<sup>292</sup> Therefore, the court of appeals held that the trial court's failure to state the reasons for imposing the maximum sentence was not error, because the record established that the sentence was imposed pursuant to a binding plea agreement.<sup>293</sup>

A case that concerned issues similar to those in *Goldsmith* was *Munger v. State*.<sup>294</sup> The defendant pleaded guilty to forgery and was sentenced to eight years of imprisonment as part of a plea agreement accepted by the trial court. On appeal, the defendant urged that the trial court erred in failing to consider whether the defendant was eligible for drug abuse treatment as provided for by statute.<sup>295</sup> According to the statute, if the defendant were to be treated as a drug abuser, a trial court must put the drug abuser on probation. Because the trial court in this case had accepted a plea agreement which required the defendant to serve eight years, the court of appeals held that, pursuant to *Goldsmith*, the trial court had no discretion to grant the defendant probation as a drug abuser.<sup>296</sup> The court of appeals stressed that this holding should not be read as an emasculation of the drug abuse statutes, as the statutes remain relevant as long as this alternative is considered *before* a plea agreement is accepted by the court.<sup>297</sup> For

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<sup>288</sup>See IND. CODE § 35-4.1-4-3 (1982).

<sup>289</sup>420 N.E.2d at 1369 (citing IND. CODE § 35-4.1-4-3 (1982)).

<sup>290</sup>420 N.E.2d at 1369.

<sup>291</sup>*Id.* (citing *Goldsmith v. Marion County Superior Court*, 419 N.E.2d 109 (Ind. 1981)).

<sup>292</sup>420 N.E.2d at 1370.

<sup>293</sup>*Id.*

<sup>294</sup>420 N.E.2d 1380 (Ind. Ct. App. 1981).

<sup>295</sup>See IND. CODE § 16-13-6.1-18 (1982).

<sup>296</sup>420 N.E.2d at 1383.

<sup>297</sup>*Id.* The court in *Munger* noted that the plea agreement may contain a "reservation of rights" which would allow the trial court to consider probation under the drug abuse treatment statutes after it accepts the plea agreement. *Id.* at 1383 n.3.



example, if the trial court has reason to believe that the defendant is eligible for drug abuse treatment at the time a plea agreement is submitted to the court, the trial court might defer accepting the plea agreement and its terms, until the defendant has an opportunity to undergo drug abuse treatment.<sup>298</sup> However, after accepting a plea agreement that provides for an executed sentence, the court is without authority to grant probation.

The final case of the trilogy is *Walker v. State*.<sup>299</sup> The court in *Walker* examined the difference between a binding and a nonbinding plea agreement. The factual context of the *Walker* case was different than that involved in *Goldsmith*, *Dolan*, or *Munger*. In *Walker*, the defendant was attempting to enforce a plea agreement. The prosecuting attorney and the defendant submitted an agreement to the trial court in which the defendant agreed to plead guilty to burglary as a Class C felony. The terms of the agreement explained that the potential range of punishment was from two to eight years of imprisonment, and that "[t]he Prosecutor has agreed not to argue for more than a five (5) year term of imprisonment."<sup>300</sup> The prosecutor did recommend a sentence of five years, but the trial judge rejected the prosecutor's recommendation and imposed an eight-year sentence. On appeal, the defendant sought specific enforcement of the plea agreement.

The court of appeals rejected the defendant's contention and held that the plea agreement was nonbinding.<sup>301</sup> Recognizing the distinction between a binding and nonbinding plea agreement, the court stated that:

Under a "nonbinding" sentence recommendation, the defendant extracts a promise from the prosecutor to advocate the imposition of a particular sentence (or that the prosecutor will remain mute at the sentencing hearing), but the defendant knowingly, voluntarily, and intelligently submits to the agreement with the understanding that the sentence recommendation is "nonbinding" and that he or she is not entitled to withdraw the guilty plea if the trial court rejects the recommended sentence.<sup>302</sup>

Although this distinction is not drawn from specific statutory provi-

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<sup>298</sup>See IND. CODE § 16-13-6.1-17 (1982) (allowing trial court to defer prosecution for the substantive offense while the defendant receives drug abuse treatment).

<sup>299</sup>420 N.E.2d 1374 (Ind. Ct. App. 1981).

<sup>300</sup>*Id.* at 1376. The court noted that a prosecutor, when bound to recommend a particular sentence, "must advocate that sentence persuasively and unequivocally." *Id.* at 1375 n.2.

<sup>301</sup>*Id.* at 1379.

<sup>302</sup>*Id.* at 1378. The distinction between binding and nonbinding plea agreements has been recognized in most federal courts. See the cases cited at *id.* at 1379.

sions, it is necessary for the rational application of the plea bargain statutes.<sup>303</sup> Furthermore, the court in *Walker* noted that if the supreme court's decision in *Goldsmith* was extended to nonbinding plea agreements, the effect would be to "thwart the intent of the parties and circumvent the plain meaning of the terms of the plea agreement."<sup>304</sup>

The new procedure code has followed the decisions of *Goldsmith*, *Dolan*, *Munger*, and *Walker*. The plea agreement statute has been transferred to the new code,<sup>305</sup> as have the statutes that require advising the defendant of his rights prior to the court's acceptance of a guilty plea.<sup>306</sup> Under the previous applicable code sections, before accepting a guilty plea, the defendant was to be advised that the judge was not a party to any agreement between the prosecutor and the defendant and, therefore, was not bound by the agreement.<sup>307</sup> The new code provides that the judge must determine whether a written sentence recommendation has been executed by the prosecutor and the defendant, and that if one exists, the judge must advise the defendant that if the court accepts the recommendation, then the court is bound by the terms.<sup>308</sup> *Walker* will still be relevant case law under the new code because a judge will only be bound by a "binding" agreement; however, if the agreement is nonbinding, the trial court should probably continue to advise the defendant that the court is not bound by that *particular* agreement, even though the statute no longer requires such an advisement.

As always, a number of cases decided during the survey period involve the proper advisement of the defendant's rights prior to the court's acceptance of a guilty plea. According to prior law<sup>309</sup> and the new procedure code, a defendant must be advised of "the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences."<sup>310</sup>

In *Pearson v. State*,<sup>311</sup> the defendant's conviction for escaping was reversed because the trial court, prior to accepting the defendant's guilty plea, failed to advise him that any sentence received for escape

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<sup>303</sup>420 N.E.2d at 1378.

<sup>304</sup>*Id.*

<sup>305</sup>*See* IND. CODE §§ 35-35-3-1 to -7 (1982).

<sup>306</sup>*See id.* at §§ 35-35-1-1 to -4.

<sup>307</sup>*Id.* at § 35-4.1-1-3(e) (1976) (repealed 1981).

<sup>308</sup>*Id.* at § 35-35-1-2(a)(4) (1982).

<sup>309</sup>*Id.* at § 35-4.1-1-3(d) (1976) (repealed 1981).

<sup>310</sup>*Id.* at § 35-35-1-2(a)(3) (1982).

<sup>311</sup>428 N.E.2d 808 (Ind. Ct. App. 1981).



must be served consecutively to the sentence the defendant was currently serving. Conversely, in *Romine v. State*<sup>312</sup> the trial court erroneously told the defendant that two sentences were required to be served consecutively. Despite this misinformation, the supreme court affirmed the conviction, because it found that the defendant fully understood the consequences of his plea.<sup>313</sup>

Proper advice as to sentencing consequences was also the issue in *Ricketts v. State*.<sup>314</sup> In this decision, the defendant pleaded guilty to a Class D felony. The court of appeals reversed the conviction because the trial court, prior to accepting the defendant's guilty plea, had not advised the defendant of the possible minimum sentence for a Class D felony.<sup>315</sup> The trial court had advised the defendant that the penalty was two years of imprisonment with a possible enhanced sentence of four years. However, the court of appeals noted that the trial court had not advised the defendant of the possibility of alternative misdemeanor sentencing which exists for a Class D felony.<sup>316</sup> Thus, the court in *Ricketts* clearly establishes that the courts must strictly comply with the terms of the guilty plea advisement statute.

In another decision, *Nash v. State*,<sup>317</sup> the court of appeals considered the prosecuting attorney's threat to file habitual criminal charges in order to obtain a guilty plea. It is not unlawful coercion to use the threat of an habitual criminal charge to induce the defendant to plead guilty.<sup>318</sup> However, as the decision in *Nash* illustrates, there must be a "legitimate basis" for threatening the habitual charge. The defendant in *Nash* was charged with numerous thefts arising out of his involvement with a car theft ring. Eight separate habitual offender counts were appended to eight theft charges. The habitual criminal charges were based on the defendant's 1975 convictions for theft and automobile banditry. The court of appeals first noted that the two prior felonies were not unrelated felony convictions as required by the habitual criminal statute,<sup>319</sup> because the second felony had not been committed after the defendant had been sentenced for the first felony.<sup>320</sup> Moreover, the conviction for auto banditry was vacated six months before the theft charges in the current case were filed. The court also noted that it was clear from the record that the plea bargain

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<sup>312</sup>431 N.E.2d 780 (Ind. 1982).

<sup>313</sup>*Id.* at 784.

<sup>314</sup>429 N.E.2d 289 (Ind. Ct. App. 1981).

<sup>315</sup>*Id.* at 290.

<sup>316</sup>*Id.* See IND. CODE § 35-50-2-7 (1982).

<sup>317</sup>429 N.E.2d 666 (Ind. Ct. App. 1981).

<sup>318</sup>See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Holmes v. State*, 398 N.E.2d 1279 (Ind. 1980).

<sup>319</sup>IND. CODE § 35-50-2-8(b) (1982); See *Miller v. State*, 417 N.E.2d 339 (Ind. 1981).

<sup>320</sup>429 N.E.2d at 668.

in the case was influenced by the habitual offender allegations, and their dismissal was part of the plea bargain.

Indiana law requires that a trial judge inquire of a defendant who is pleading guilty whether any promises, threats, or force were used to obtain his plea.<sup>321</sup> The trial judge in *Nash* did not make this inquiry, and the court of appeals found this omission especially egregious in view of the improper allegations of habitual criminal acts that were originally filed and dismissed.<sup>322</sup> There was no indication that the prosecuting attorney actually knew that the earlier auto banditry conviction had been vacated and the definition of the phrase "prior unrelated felony conviction" in the habitual criminal statute was not clarified by the Indiana Supreme Court until 1981.<sup>323</sup> Thus, the prosecutor in *Nash* may not have been acting in bad faith. However, in view of *Nash* and an earlier decision of the third district,<sup>324</sup> the prosecutor is required at least to have probable cause to believe that the defendant can be prosecuted as an habitual criminal before employing the threat of habitual criminal charges as a legitimate bargaining leverage to obtain a plea agreement. Although it is possible that the prosecutor in *Nash* may have had probable cause to file the habitual charges, even though certified records of prior convictions should have indicated reversal of the one conviction, the trial court's failure to conduct the proper inquiry doomed the defendant's conviction.

### I. Sentencing

Several of the most interesting sentencing decisions in the past year concerned probation. Early in 1981, the court of appeals, in *Barnett v. State*,<sup>325</sup> held that restitution could not be ordered as part of an executed sentence.<sup>326</sup> The court in *Barnett* stated that "[a]lthough restitution is a mitigating factor in imposing a sentence . . . nowhere in the sentencing statutes is a provision made for imposing restitution as part of a sentence to be executed."<sup>327</sup> This decision provoked

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<sup>321</sup>IND. CODE § 35-35-1-3(a) (1982).

<sup>322</sup>429 N.E.2d at 672.

<sup>323</sup>*Miller v. State*, 417 N.E.2d 339 (Ind. 1981). The court stated that to prove a "prior unrelated felony conviction" the State must, show that the defendant had been previously *twice convicted* and *twice sentenced* for felonies, that the commission of the second offense was subsequent to his having been sentenced upon the first and that the commission of the principal offense upon which the enhanced punishment is being sought was subsequent to his having been sentenced upon the second conviction.

*Id.* at 342.

<sup>324</sup>*Munger v. State*, 420 N.E.2d 1380 (Ind. Ct. App. 1981).

<sup>325</sup>414 N.E.2d 965 (Ind. Ct. App. 1981).

<sup>326</sup>*Id.* at 966.

<sup>327</sup>*Id.*



some concern that restitution could not be made a condition of probation, despite obvious statutory authorization for it.<sup>328</sup> In *Rife v. State*,<sup>329</sup> the trial judge also had ordered restitution as part of an executed sentence. Relying on *Barnett*, the court of appeals held this was fundamental error.<sup>330</sup> The importance of *Rife*, however, lies in the court's delineation of the alternatives to imposing restitution as part of the executed sentence which are available to the trial judge. The court stated that the trial judge could have fined the defendant and suspended a portion of this fine if restitution were made,<sup>331</sup> or the trial judge could have required restitution or reparation as a condition to probation.<sup>332</sup> Thus, the court in *Rife* cleared up any concerns over whether restitution can be made a condition to probation.

Ordering restitution as a condition of probation is one thing; revoking probation for failing to make restitution is another. That was the problem confronting the court of appeals in *Sparkman v. State*.<sup>333</sup> Sparkman pleaded guilty to check deception, and it was shown that he had passed other bad checks which totaled \$501. The trial court suspended the defendant's six-month sentence on the condition that he make restitution of \$501 in twenty days, and Sparkman agreed. Sparkman failed to make restitution and the State filed a petition for revocation of his probation.

Under the Indiana Code, probation can not be revoked for failure to meet financial obligations imposed as a condition to probation, unless the person "recklessly, knowingly, or intentionally fails to pay."<sup>334</sup> Sparkman had made no attempt to contact the court or the prosecuting attorney concerning his ability to pay. He paid nothing on the obligation, and when the State filed a petition to revoke his probation, he left the state. Although briefly employed in Nevada, he made no effort to make restitution.<sup>335</sup> Consequently, the court of appeals held that the evidence was sufficient to find that Sparkman recklessly, knowingly, and intentionally failed to pay.<sup>336</sup>

The special nature of probation revocation proceedings was made evident by two other decisions during the past year. In *Jackson v. State*,<sup>337</sup> the defendant was placed on probation after a burglary conviction. Subsequently, the defendant was charged with committing a

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<sup>328</sup>See IND. CODE § 35-7-2-1(a)(5) (1982).

<sup>329</sup>424 N.E.2d 188 (Ind. Ct. App. 1981).

<sup>330</sup>*Id.* at 192.

<sup>331</sup>For statutory support, see IND. CODE § 35-50-3-1 (1982).

<sup>332</sup>For statutory support, see *id.* § 35-7-2-1(a)(5).

<sup>333</sup>432 N.E.2d 437 (Ind. Ct. App. 1982).

<sup>334</sup>IND. CODE § 35-7-2-2(e) (1982).

<sup>335</sup>Sparkman had apparently not been otherwise employed since 1978.

<sup>336</sup>432 N.E.2d at 440.

<sup>337</sup>420 N.E.2d 1239 (Ind. Ct. App. 1981).

crime while on probation, but a jury acquitted him of that offense. Two months later, the defendant's probation was revoked on the basis of the same conduct for which he was acquitted by the jury. The defendant argued that double jeopardy barred the revocation of his probation following an acquittal for the same conduct. The court of appeals acknowledged that this was a case of first impression in Indiana and decided to follow what it labeled as the majority position in the United States which permits a revocation.<sup>338</sup> The court also noted that Indiana Code section 35-7-2-2(d)<sup>339</sup> requires the State to prove a probation violation by a civil preponderance of the evidence, rather than beyond a reasonable doubt.<sup>340</sup>

In *Shumaker v. State*,<sup>341</sup> the defendant was found to have violated the conditions of his probation by failing to remain on good behavior and by possessing or using marijuana. Two of the items attached to the petition for revocation were two voluntary statements made by the defendant to his probation officer. The defendant contended on appeal that the statements were erroneously admitted at his revocation hearing because the State failed to establish the *corpus delicti*. The court of appeals stated that, although a person is entitled to certain due process rights at a revocation hearing,<sup>342</sup> the hearing is civil in nature with the burden of proof being a preponderance of the evidence.<sup>343</sup> Although an arrest standing alone will not necessarily support revocation of probation, where evidence is sufficient to show that an arrest was reasonable and that there is probable cause to believe that the defendant has violated a criminal law, revocation of probation is proper.<sup>344</sup> In this case, documents were submitted showing that warrants had been issued for the defendant's arrest, and the defendant's statements were used to establish probable cause for his arrest. Therefore, the trial court could find that the defendant's arrest was reasonable and that there was probable cause to believe the defendant had violated a criminal law. Consequently, the court of appeals held that probation could be revoked on the basis that the arrest was reasonable, and there was no need to establish *corpus delicti* to admit the statements.<sup>345</sup>

The "rule of lenity" (or perhaps it should be called the "single

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<sup>338</sup>*Id.* at 1242.

<sup>339</sup>IND. CODE § 35-7-2-2(d) (1982).

<sup>340</sup>420 N.E.2d at 1242.

<sup>341</sup>431 N.E.2d 862 (Ind. Ct. App. 1982).

<sup>342</sup>*See Morrissey v. Brewer*, 408 U.S. 471 (1972).

<sup>343</sup>431 N.E.2d at 863 (citing IND. CODE § 35-7-2-2(d) (1982); *Monroe v. State*, 419 N.E.2d 831 (Ind. Ct. App. 1981)).

<sup>344</sup>431 N.E.2d at 863 (citing *Hoffa v. State*, 267 Ind. 133, 368 N.E.2d 250 (1977)).

<sup>345</sup>431 N.E.2d at 863. The court of appeals also rejected defendant's argument that the "good behavior" condition of probation was void for vagueness. *Id.* at 864.



larceny" theory) continued to cause problems in the appellate courts. In *Lash v. State*,<sup>346</sup> three robbers entered a pizza place, held two employees at gunpoint, took the cash register receipts from one of the employees, Lewis, and took personal property from both employees, Lewis and McCollon. Because Lewis' personal property was taken at the same time as the pizza place's receipts, the court of appeals found that there was only one robbery, instead of the two robberies on which the defendant had been convicted.<sup>347</sup> A three-two majority of the Indiana Supreme Court reversed the court of appeals,<sup>348</sup> although three separate opinions were authored.

Justice Pivarnik, writing for himself and Chief Justice Givan, focused on the fact that *property* had been *taken* from three different "individuals," the two employees and the pizza place. Therefore, three convictions for robbery were appropriate.<sup>349</sup> Justice DeBruler concurred in the reversal but conducted an even more fact-sensitive analysis. He pointed out that the pizza place's cash register money was first taken from the register by one of the robbers, while another man held the two employees at gunpoint. Then the two employees were herded to the rear of the store and, under threat of force, were relieved of their personal money by the robbers. Based upon these elaborated facts, Justice DeBruler concluded that three robberies had occurred.<sup>350</sup> Thus, Justice DeBruler was not focusing completely on whose property was taken but also was focusing on the manner in which the property was taken. In other words, if the takings were not accomplished at one time by one threat or act of violence, but instead the takings involved separate property, accomplished by separate threats, perhaps with a time interval in between, then they would be separate robberies.

Justice Prentice wrote a dissent, in which Justice Hunter joined. Justice Prentice believed that most of the problems in this area stemmed from an unfortunate choice of words used in the leading case of *McKinley v. State*.<sup>351</sup> In *McKinley*, the robber took a business establishment's money from the proprietor's wife and took the personal property of the proprietor. These were considered two robberies, but in justifying the decision, the supreme court in *McKinley* referred to the business property taken from the proprietor's wife as the "rob-

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<sup>346</sup>433 N.E.2d 764 (Ind. 1982), *rev'g* 414 N.E.2d 338 (Ind. Ct. App. 1981).

<sup>347</sup>414 N.E.2d 338 (Ind. Ct. App. 1981), *rev'd*, 433 N.E.2d 764 (Ind. 1982).

<sup>348</sup>433 N.E.2d 764 (Ind. 1982).

<sup>349</sup>In another recent case, *Allen v. State*, 428 N.E.2d 1237 (Ind. 1981), Chief Justice Givan emphasized that the essence of a robbery is a "taking." In *Allen*, the supreme court held that, where the money of a credit union was taken from two tellers, there was only one robbery, a robbery from the credit union. *Id.* at 1240.

<sup>350</sup>433 N.E.2d at 767.

<sup>351</sup>400 N.E.2d 1378 (Ind. 1980).

bery of that business." Justice Prentice emphasized that robbery is the taking of property from a "person," while theft or burglary may be perpetrated against a business establishment.<sup>352</sup> The dissent then discussed *Williams v. State*,<sup>353</sup> where it was held that only one robbery, not four, was committed when a robber took a bank's money from four different tellers at the same time. Justice Prentice said that *Williams* had applied a "rule of lenity" which was developed by the federal courts in similar cases. Justice Prentice also noted that this "rule of lenity," though not described as such, had been applied in several Indiana decisions since *Williams*.<sup>354</sup> However, he recognized that other decisions had distinguished *Williams* on the basis that property taken from multiple victims belonged to multiple persons or entities.<sup>355</sup>

The dissent felt that, under the facts of this case, the defendant had committed only two offenses and was being unconstitutionally subjected to double jeopardy.<sup>356</sup> However, the dissent appears to conduct a fact-sensitive analysis similar to Justice DeBruler's concurring opinion to reach this conclusion. It felt that the employee, Lewis, was put in fear only once, at the beginning of the robbery, and this was a "continuing state" when she was relieved of her personal property.<sup>357</sup> Between these two analyses of the facts, Justice DeBruler's has more to commend it. The concurring opinion focused on the separate threats that were utilized to obtain the business' money and the personal property of Lewis. This is an objective standard that can be determined from the facts presented at trial. The dissent is inferring a mental state of the victims from the facts of the case, a more difficult determination, unless the dissent is suggesting that, as a matter of law,

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<sup>352</sup>433 N.E.2d at 767. However, as defined in the penal code, at IND. CODE § 35-41-1-2 (1982), "person" includes a "corporation, partnership, unincorporated association, or governmental entity." Even Perkins seems unsure of whether robbery is a crime against the person or against property. He discusses robbery in his chapter on larceny but offers this apology:

Robbery violates the societal interest in the safety and security of the person as well as the social interest in the protection of property rights. In fact, as a matter of abstract classification, it probably should be grouped with offenses against the person rather than with offenses against property, but it is more expedient to include it at this point.

R. PERKINS, CRIMINAL LAW 285 (2d ed. 1969). The penal code classifies robbery in the division of "Offenses Against Persons." IND. CODE § 35-42-5-1 (1982).

<sup>353</sup>395 N.E.2d 239 (Ind. 1979).

<sup>354</sup>See, e.g., *Allen v. State*, 428 N.E.2d 1237 (Ind. 1981); *Lane v. State*, 428 N.E.2d 28 (Ind. 1981); *Rogers v. State*, 396 N.E.2d 348 (Ind. 1979).

<sup>355</sup>See *Duvall v. State*, 415 N.E.2d 718 (Ind. 1981); *Ferguson v. State*, 405 N.E.2d 902 (Ind. 1980); *Young v. State*, 409 N.E.2d 579 (Ind. 1980); *Hatcher v. State*, 410 N.E.2d 1187 (Ind. 1980). See also, *Richardson v. State*, 429 N.E.2d 229 (Ind. 1981).

<sup>356</sup>433 N.E.2d at 768.

<sup>357</sup>*Id.*



the state of fear will be presumed to continue throughout the robbery.

The most accurate description of the *Lash* case and the kinds of problems it presents was made by Justice DeBruler when he stated that the approach of looking at the facts and deciding how many unitary or integrated transactions occurred “involves an act of judgment, and not surprisingly can lead at times to differing judicial opinions, even on the same appellate court.”<sup>358</sup>

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<sup>358</sup>*Id.* at 766.

