

## V. Criminal Law and Procedure

STEPHEN J. JOHNSON\*

### A. Crimes

1. *Statutory Developments.*—*a. Generally.*—During the survey period, the Indiana legislature did not enact any sweeping revisions of criminal law or procedure. Nonetheless, some portions of Indiana's penal code were amended or augmented in significant ways.<sup>1</sup> Additionally, several new criminal laws were enacted during the last year.<sup>2</sup>

*b. Sex crimes.*—The definition of "deviate sexual conduct" in the penal code was amended to include not only acts which traditionally have been thought of as sodomy, but also to include "the penetration of the sex organ or anus of a person by an object."<sup>3</sup> This offense had been previously punished as the crime of criminal deviate conduct.<sup>4</sup> The amendment was designed to alleviate gaps in the law that had developed because Indiana had a general definition for "deviate sexual conduct"<sup>5</sup> and a specific crime of "criminal deviate conduct"<sup>6</sup> which included acts of deviate sexual conduct. The term "deviate sexual conduct" is used in a number of different sex offense statutes,<sup>7</sup> but, as previously defined, the term did not include the penetration of a sex organ or the anus by an object. Thus, for example, it was the crime of criminal deviate conduct to insert an inanimate object into the sex organ of a victim, but it was not child molesting to commit the same act on a child. This incongruity was remedied by the amendment to the term "deviate sexual conduct."

The Indiana legislature also enacted a statute creating two new offenses designed to punish certain forms of sexual behavior or attempted

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\*Director of Research, Indiana Prosecuting Attorneys Council. B.S., Michigan State University, 1970; J.D., Indiana University School of Law—Bloomington, 1973.

<sup>1</sup>See *infra* notes 3-7, 15, 18-24 and accompanying text.

<sup>2</sup>See *infra* notes 8-14, 17 and accompanying text.

<sup>3</sup>Act of Feb. 29, 1984, Pub. L. No. 183-1984, § 1, 1984 Ind. Acts. 1497 (codified at IND. CODE § 35-41-1-9 (Supp. 1984)).

<sup>4</sup>IND. CODE § 35-42-4-2(b) (1982).

<sup>5</sup>IND. CODE § 35-41-1-2 (1982) (repealed 1983) defined "deviate sexual conduct" generally as "an act of sexual gratification involving a sex organ of one person and the mouth or anus of another person." *Id.*

<sup>6</sup>IND. CODE § 35-42-4-2 (1982).

<sup>7</sup>See IND. CODE § 35-42-4-3 (1982) (child molesting); IND. CODE § 35-42-4-4 (Supp. 1984) (child exploitation); IND. CODE § 35-45-4-2 (Supp. 1984) (prostitution); IND. CODE § 35-46-1-3 (1982) (incest); IND. CODE § 35-49-1-9 (Supp. 1984) (obscenity). Additionally, two newly enacted criminal statutes utilize the term "deviate sexual conduct." See IND. CODE § 35-42-4-5 (Supp. 1984) (vicarious sexual gratification); IND. CODE § 35-42-4-6 (Supp. 1984) (child solicitation).

sexual behavior with children.<sup>8</sup> The state's existing child molesting statute,<sup>9</sup> strictly interpreted, neither punished someone who forced a child to fondle himself or another person, nor punished someone who forced a child to have sexual relations with a person other than the defendant. It was assumed that persons seeking to abuse children sexually would be the direct recipients of some form of physical contact with the child. This assumption overlooked those who derive pleasure from watching a child commit a sexual act with someone else. As a result, a new offense, vicarious sexual gratification, was created to prohibit this form of child sexual abuse.<sup>10</sup> It prohibits a person eighteen years of age or older from directing, aiding, inducing, or causing a child to fondle himself or another child, or to engage in sexual intercourse, deviate conduct, or bestiality "with intent to arouse or satisfy the sexual desires of a child or the older person."<sup>11</sup>

The second new offense, child solicitation, prohibits a person more than eighteen years of age from soliciting a child under twelve years of age to engage in sexual intercourse, deviate sexual conduct, or fondling.<sup>12</sup> The new statute is designed to reach conduct that could be described as an attempted child molestation. Such conduct, however, is probably not within the reach of Indiana's general attempt statute<sup>13</sup> because mere verbal communication to the child might not be considered enough of a "substantial step" toward completion of the crime to constitute an attempt.<sup>14</sup>

The legislature amended a third sex offense statute to punish as indecent exposure the activities of one who engages in sexual conduct

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<sup>8</sup>Act of Feb. 29, 1984, Pub. L. No. 183-1984, §§ 4-5, 1984 Ind. Acts 1497, 1499-1500 (codified at IND. CODE §§ 35-42-4-5, -6 (Supp. 1984)).

<sup>9</sup>IND. CODE § 35-42-4-3 (1982).

<sup>10</sup>Act of Feb. 29, 1984, Pub. L. No. 183-1984, § 4, 1984 Ind. Acts 1497, 1499 (codified at IND. CODE § 35-42-4-5 (Supp. 1984)).

<sup>11</sup>IND. CODE § 35-42-4-5 (Supp. 1984).

<sup>12</sup>Act of Feb. 29, 1984, Pub. L. No. 183-1984, § 5, 1984 Ind. Acts 1497, 1499 (codified at IND. CODE § 35-42-4-6 (Supp. 1984)).

<sup>13</sup>IND. CODE § 35-41-5-1 (1982) provides in part: "A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of the crime." *Id.*

<sup>14</sup>The drafters of Indiana's penal code relied heavily upon the Model Penal Code, but chose not to adopt the general solicitation offense defined in the model act. MODEL PENAL CODE § 5.02 (Proposed Official Draft 1962) defines criminal solicitation:

A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

*Id.* If the Indiana penal code drafters had included the general solicitation offense, the newly enacted child solicitation statute would not have been necessary.

in other than a public place with the intent that he or she be seen by other persons.<sup>15</sup> The amendment was intended to prohibit the activities of someone who stands in front of his picture window inside his house while committing some form of public indecency. The legislature apparently believed that this conduct could not be considered "public" indecency because the offender would be on his own private property at the time of the act. No Indiana appellate decision, however, has ever construed the public indecency statute so narrowly, and decisions from other jurisdictions indicate that this kind of activity could be considered to be in a "public place."<sup>16</sup>

*c. Miscellaneous.*—The legislature expanded the chapter dealing with offenses against the family to include protection for persons more than sixty years old who are classified as "endangered adults."<sup>17</sup> This provision was designed to give endangered adults the kind of protection presently afforded child abuse or neglect victims.

In addition, the legislature broadened the scope of conduct that will elevate the charge of resisting law enforcement from a Class A misdemeanor to a Class D felony.<sup>18</sup> Under the new law, if a person "operates a vehicle in a manner that creates a substantial risk of bodily injury to another person"<sup>19</sup> while resisting law enforcement, that person commits a Class D felony.

Finally, the legislature changed the grade of offense in three kinds of criminal activities. First, Indiana's robbery statute was amended to lower the grade of felony to Class B when robbery "results in bodily

<sup>15</sup>Act of Mar. 5, 1984, Pub. L. No. 189-1984, § 1, 1984 Ind. Acts 1506 (codified at IND. CODE § 35-45-4-1 (Supp. 1984)).

<sup>16</sup>See *State v. Vega*, 38 Conn. Supp. 313, 444 A.2d 927 (1982); *Hester v. State*, 164 Ga. App. 871, 298 S.E.2d 292 (1982); *People v. Legel*, 24 Ill. App. 3d 554, 321 N.E.2d 164 (1974).

<sup>17</sup>Act of Feb. 24, 1984, Pub. L. No. 185-1984, 1984 Ind. Acts 1501 (codified at IND. CODE §§ 35-42-2-1, 35-46-1-1-, 35-36-1-12, 35-46-1-13, 35-46-1-14 (Supp. 1984)). An "endangered adult" is defined as

a person sixty (60) years of age or older who is unable to protect his interests and who is harmed or threatened with harm by either himself or another person as a result of:

- (1) failure to comprehend either the nature of his situation or the consequences of the continuation of his situation;
- (2) incompetence;
- (3) neglect;
- (4) battery; or
- (5) exploitation of the person's personal services or property.

IND. CODE § 35-46-1-1 (Supp. 1984).

<sup>18</sup>Act of Feb. 29, 1984, Pub. L. No. 188-1984, 1984 Ind. Acts 1505 (codified at IND. CODE § 35-44-3-3 (Supp. 1984)).

<sup>19</sup>IND. CODE § 35-44-3-3 (Supp. 1984).

injury to any person other than a defendant.”<sup>20</sup> Formerly, a robbery that resulted in any form of bodily injury was a Class A felony.<sup>21</sup> Class A felony status was retained only in cases in which “serious bodily injury” happens to one other than a defendant.<sup>22</sup> Second, the legislature raised the penalty for leaving the scene of an accident that causes serious bodily injury or death from a Class B misdemeanor to a Class D felony.<sup>23</sup> Third, the intimidation statute was amended to make it a Class D felony to threaten a judge.<sup>24</sup>

2. *Assisting a Criminal*.—In a 1983 decision, the Indiana Court of Appeals interpreted the “assisting a criminal” statute.<sup>25</sup> In *Moore v. State*<sup>26</sup> the defendant was charged with murder and attempted murder. He eventually was convicted of assisting a criminal. On appeal, the defendant argued that he could not be convicted of a crime with which he was never charged and which was not a lesser included offense of the crimes charged. The State argued that assisting a criminal was a lesser included offense of murder or attempted murder, and alternatively that even if it were not a lesser included offense, the defendant invited any error in the verdict by tendering an instruction on assisting a criminal as a lesser included offense.<sup>27</sup>

The court agreed with the State’s invited error argument and sustained the assisting a criminal conviction.<sup>28</sup> The court stated, “assisting a criminal is a lesser included offense of murder and attempted murder.”<sup>29</sup> The court’s authority for that statement, *Smith v. State*,<sup>30</sup> is of questionable value. The court in *Smith* held that when a person is convicted of robbery, murder, and assisting a criminal, the assisting conviction merges into the murder and robbery convictions “as an included offense in the commission of those crimes.”<sup>31</sup> By phrasing its decision in terms of the lesser included offense and merger doctrines, the Indiana Supreme Court, in *Smith*, confused the point it apparently was trying to make clear.

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<sup>20</sup>Act of Feb. 24, 1984, Pub. L. No. 186-1984, 1984 Ind. Acts 1504 (codified at IND. CODE § 35-42-5-1 (Supp. 1984)).

<sup>21</sup>IND. CODE § 35-42-5-1 (1982).

<sup>22</sup>IND. CODE § 35-42-5-1 (Supp. 1984).

<sup>23</sup>Act of Feb. 24, 1984, Pub. L. No. 76-1984, §1, 1984 Ind. Acts 942 (codified at IND. CODE § 9-4-1-40(b) (Supp. 1984)).

<sup>24</sup>Act of Feb. 29, 1984, Pub. L. No. 183-1984, § 6, 1984 Ind. Acts 1497 (codified at IND. CODE § 35-45-2-1(a)(Supp. 1984)).

<sup>25</sup>IND. CODE § 75-44-3-2 (1982).

<sup>26</sup>445 N.E.2d 576 (Ind. Ct. App. 1983).

<sup>27</sup>*Id.* at 578.

<sup>28</sup>*Id.*

<sup>29</sup>*Id.* (citing *Smith v. State*, 429 N.E.2d 956, 959 (Ind. 1982)).

<sup>30</sup>429 N.E.2d 956 (Ind. 1982).

<sup>31</sup>*Id.* at 959.

The assisting a criminal statute is designed to reach conduct that would have been within the traditional accessory after the fact crime.<sup>32</sup> Its objective is to punish someone who assists a criminal's escape after the criminal has committed a crime.<sup>33</sup> Given that statutory purpose, it would be anomalous to punish someone as both the principal in a crime and as an accessory to that crime, even if he assisted his accomplice's escape instead of his own. The general rule has been that a person cannot be both the principal in a crime and an accessory after the fact.<sup>34</sup> This appears to be the theory of law the Indiana Supreme Court was trying to express in *Smith*, but its description in terms of greater and lesser included offenses confused the issue.

Indeed, after applying the rules for determining when one offense is included in another, it is difficult to conceive of a situation in which assisting a criminal would be an included offense of murder.<sup>35</sup> In 1984, the Indiana Supreme Court recognized this fact in *Reynolds v. State*<sup>36</sup> and declared that the court of appeals' view in *Moore* was overly broad: "Assisting a criminal is not, in every instance, a lesser included offense of murder."<sup>37</sup> The court said it was obvious that one may commit a murder without committing the crime of assisting a criminal. Therefore, assisting a criminal is not an "inherently included" lesser offense of murder, although it may be a "possibly included" lesser offense of murder.<sup>38</sup> The outcome of the lesser included offense inquiry depends upon the language of the charging instrument for murder.

3. *Burglary*.—In the last year, several Indiana courts clarified the key terms, "dwelling," "structure," and "breaking," contained in the

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<sup>32</sup>IND. CODE ANN. § 35-44-3-2 Indiana Criminal Law Commission Comments (West 1978).

<sup>33</sup>IND. CODE § 35-44-3-2 (1982) provides in pertinent part:

A person not standing in the relation of parent, child, or spouse to another person who has committed a crime or is a fugitive from justice who, with intent to hinder the apprehension or punishment of the other person, harbors, conceals, or otherwise assists the person commits assisting a criminal, a Class A misdemeanor.

*Id.*

<sup>34</sup>W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 523 (1972) [hereinafter cited as LAFAVE & SCOTT] R. PERKINS, CRIMINAL LAW 669 (2d ed. 1969).

<sup>35</sup>See *Lawrence v. State*, 268 Ind. 330, 375 N.E.2d 208 (1978); *Roddy v. State*, 182 Ind. App. 156, 394 N.E.2d 1098 (1979).

<sup>36</sup>460 N.E.2d 506 (Ind. 1984).

<sup>37</sup>*Id.* at 509.

<sup>38</sup>The court explained the difference between the two types of included offenses identified in Indiana case law: "The 'inherently included' lesser offense exists when, by definition, it is impossible to commit the greater offense without committing the lesser offense. An offense is 'possibly included' depending upon the manner and means allegedly employed in the commission of the charged crime." 460 N.E.2d at 510 (citing *Roddy v. State*, 182 Ind. App. 156, 168, 394 N.E.2d 1098, 1105-06 (1979)).

burglary statute.<sup>39</sup> In *Joy v. State*,<sup>40</sup> five men surreptitiously entered a lumber yard enclosed by a fence. A sixth man, the defendant, drove the others to the lumber yard and gave them a list of items he wanted stolen. While the defendant remained outside, the other five apparently hopped the fence and removed lumber from storage sheds that were completely open on one side. The fence surrounding the lumber yard was cut with a pair of wire cutters so the lumber could be taken out through the opening and loaded onto a waiting semitrailer.<sup>41</sup>

The issue before the court of appeals was whether or not the fence and open storage sheds were "buildings or structures" within the meaning of the burglary statute. The defendant contended they were not, supporting his argument with a Texas case that held that a defendant did not commit burglary when he cut through a chain link fence surrounding a lumber yard, entered through an open doorway of a building, and removed some lumber.<sup>42</sup> The Indiana Court of Appeals distinguished the Texas decision because of differences between the Indiana and Texas burglary statutes. The Texas statute prohibited only burglary of a "building," while the Indiana statute prohibited burglary of a "building or structure."<sup>43</sup> The court noted that the Texas decision was based on a holding that the fence was not a "building," and that entering through an open door was not a "breaking."

The Indiana Court of Appeals went on to conclude that the fence surrounding the lumber yard was a "structure" under Indiana's burglary statute.<sup>44</sup> This conclusion focused on whether the fence surrounding the lumber yard was clearly "for the purpose of protecting property within its confines and [was], in fact, an integral part of a closed compound."<sup>45</sup>

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<sup>39</sup>IND. CODE § 35-43-2-1 (1982) provides:

A person who breaks and enters the building or structure of another person, with intent to commit a felony in it, commits burglary, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon or if the building or structure is a dwelling, and a Class A felony if it results in either bodily injury or serious bodily injury to any person other than a defendant.

*Id.*

<sup>40</sup>460 N.E.2d 551 (Ind. Ct. App. 1984).

<sup>41</sup>*Id.* at 555.

<sup>42</sup>*Id.* at 557 (citing *Day v. State*, 534 S.W.2d 681 (Tex. 1976)).

<sup>43</sup>IND. CODE § 35-43-2-1 (1982) (emphasis added); see 460 N.E.2d at 557 n.7.

<sup>44</sup>460 N.E.2d at 558. The court relied in part on four decisions from other jurisdictions that held that breaking into a fenced enclosure was burglary. See *People v. Moyer*, 635 P.2d 553, (Colo. 1981) (fenced dog kennel was an "occupied structure" under burglary statute); *Stanley v. State*, 512 P.2d 829 (Okla. Crim. App. 1973); *State v. Roadhs*, 71 Wash. 2d 705, 430 P.2d 586 (1967); *State v. Livengood*, 14 Wash. App. 203, 540 P.2d 480 (1975).

<sup>45</sup>460 N.E.2d at 558 (quoting *State v. Roadhs*, 71 Wash. 2d 705, 708-09, 430 P.2d 586, 588 (1967)).

This will continue to be the test for determining whether or not a burglary has been committed when property enclosed by a fence has been entered with the intent to commit a felony therein. Because the court interpreted the word "structure" in the burglary statute to include the fence, it did not answer the question of whether the open storage sheds inside the fence were buildings or structures.

A secondary issue raised was whether there was sufficient evidence at trial to prove that a breaking had occurred.<sup>46</sup> The evidence was unclear as to how entry into the lumber yard was made. It was possible that the defendant's accomplices simply cut through the fence and entered the lumber yard that way; if so, it is certain that this would constitute a breaking. It was also possible that the burglars climbed over the fence and later cut through it to "break out" of the lumber yard. Prior to this case, it was unclear whether climbing over a fence would constitute a breaking.<sup>47</sup> Breaking has generally been interpreted to require at least the use of some slight force to gain entry, such as pushing open a door or turning a door handle.<sup>48</sup> Merely walking through an open door does not constitute a breaking.<sup>49</sup> Thus, the *Joy* case raised an interesting issue as to whether hopping over a fence constitutes a breaking. The court of appeals held that it does:<sup>50</sup>

We perceive no difference in our conclusion depending on how the confederates got past the fence. Whether they hopped over it, drove through it, or cut it with wire cutters is of no import. The fact that they crossed over a structure intended to keep them out is sufficient to establish a breaking occurred.<sup>51</sup>

While this interpretation of breaking has much to commend it, there may be difficulty in reconciling it with the general common law rule that merely crossing an imaginary line does not constitute a breaking.<sup>52</sup> Nevertheless, a fence is not a mere imaginary boundary. It is designed as a form of security to keep intruders out. Scaling a fence is much more intrusive than walking across an invisible line on the ground. If

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<sup>46</sup>460 N.E.2d at 556.

<sup>47</sup>Alternatively, one might argue that even if climbing the fence was not a breaking, cutting through the fence to make an exit was a breaking. It is a matter for debate whether or not "breaking out" constitutes a breaking for purposes of a burglary statute. See LAFAVE & SCOTT, *supra* note 34, at 197.

<sup>48</sup>See, e.g., *Howard v. State*, 433 N.E.2d 753 (Ind. 1982); *Jacobs v. State*, 454 N.E.2d 894 (Ind. Ct. App. 1983); *McCormick v. State*, 178 Ind. App. 206, 382 N.E.2d 172 (1978).

<sup>49</sup>See, e.g., *Passwater v. State*, 248 Ind. 454, 229 N.E.2d 718 (1967). *But cf.* *Smith v. State*, 454 N.E.2d 412 (Ind. 1983).

<sup>50</sup>460 N.E.2d at 558-59.

<sup>51</sup>*Id.* at 559 n.8.

<sup>52</sup>4 W. BLACKSTONE, COMMENTARIES 226 (1857); R. PERKINS, *supra* note 34, at 192 (2d ed. 1969); Annot., 70 A.L.R.3D 881 (1976).

the gate to the fence had been unlocked and the burglars had exerted the slightest effort to open it, their actions would be a breaking. It is difficult to see why surmounting the same obstacle by climbing over it, with the same intent to steal, should not be punishable as burglary.<sup>53</sup>

Whether the burglarized place is ultimately defined as a "building" or a "structure" will make little difference to most defendants charged with burglary. If the burglary is of either a building or a structure, it will be punished as a Class C felony.<sup>54</sup> The important question for burglars will be whether or not the building fits the definition of a "dwelling," because burglary of a dwelling is a Class B felony.<sup>55</sup>

In *Jones v. State*,<sup>56</sup> the issue was whether a vacation cabin was a dwelling within the meaning of the burglary statute.<sup>57</sup> The victim's vacation cabin was a three-room log structure, furnished sparsely and used as a sportsman's retreat. The owner was in the process of repairing the cabin and slept overnight there on the day of the burglary.<sup>58</sup> It was not the owner's principal place of residence.

On appeal, the defendant argued that he did not burglarize *a dwelling*. He relied on three Indiana cases that held that temporary retreats or vacation homes do not qualify as dwellings.<sup>59</sup> The court of appeals characterized the holdings on which the defendant relied as nullities because of significant statutory developments since the earlier cases.<sup>60</sup> The burglary statute in effect at the time of those decisions made it the crime of first degree burglary to break and enter "any dwelling house or other place of human habitation."<sup>61</sup> In contrast, the court of appeals emphasized the broader terminology in the current statutory definition of "dwelling," concluding that the Indiana legislature intended a less

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<sup>53</sup>Finally, it should be noted that the Indiana Court of Appeals held that the trial court did not abuse its discretion in refusing the defendant's tendered instructions defining "building or structure" and "breaking and entering." 460 N.E.2d at 565. The court noted that a trial court has discretion to permit a jury to rely on its common sense understanding of words that are not terms of art. *Id.* The court's correct resolution of this issue seems somewhat ironic given the amount of effort the appeals court engaged in when analyzing the meanings of "structure" and "breaking."

<sup>54</sup>IND. CODE § 35-43-2-1 (1982).

<sup>55</sup>*Id.* The difference in penalty is what makes the difference in definitions significant. One may burglarize a building or a structure without burglarizing a dwelling. *See Goodpaster v. State*, 273 Ind. 170, 175, 402 N.E.2d 1239, 1242 (1980).

<sup>56</sup>457 N.E.2d 231 (Ind. Ct. App. 1983).

<sup>57</sup>*Id.* at 233. Unlike the terms "building" or "structure," there is a statutory definition of "dwelling." The term means "a building, structure, or other enclosed space, permanent or temporary, movable or fixed, that is a person's home or place of lodging." IND. CODE § 35-41-1-10 (Supp. 1984).

<sup>58</sup>457 N.E.2d at 233.

<sup>59</sup>*Id.* (citing *Smart v. State*, 244 Ind. 69, 190 N.E.2d 650 (1963); *Carrier v. State*, 227 Ind. 726, 89 N.E.2d 74 (1949); *Middleton v. State*, 181 Ind. App. 232, 391 N.E.2d 657 (1979)).

<sup>60</sup>457 N.E.2d at 234.

<sup>61</sup>IND. CODE § 10-701 (Burns 1956) (current version at IND. CODE 35-43-2-1 (1982)).

restrictive interpretation of the term, one which includes a vacation cabin.<sup>62</sup> In an alternative ground for its holding, the court observed that one of the earlier cases held that a recreational cabin might be a dwelling if it were occupied at the time the break-in occurred.<sup>63</sup> Under the rule of that case, the vacation cabin in *Jones* would still be considered a dwelling.

Finally, in *Gaunt v. State*,<sup>64</sup> the defendant broke and entered into an attached garage and removed some property. The garage was attached to the house through an interior door and was used for family storage. Although by entering the garage the defendant did not have immediate access to the actual living quarters of the house, the supreme court held that the defendant had, nonetheless, entered a private part of the victims' dwelling and was thus guilty of burglary of a dwelling.<sup>65</sup>

The decisions of *Joy*, *Jones*, and *Gaunt* represent the courts' continuing common sense, expansive interpretations of Indiana's burglary statute, a trend away from strict adherence to a traditional common law concept of burglary. The trend is appropriate because, as one commentator has noted, "Of all common law crimes, burglary today perhaps least resembles the prototype from which it sprang."<sup>66</sup>

4. *Disorderly Conduct*.—From the standpoint of legal analysis, disorderly conduct cases are some of the most interesting because they often involve a free speech issue. Two cases decided during the survey period, *Cavazos v. State*<sup>67</sup> and *Mesarosh v. State*,<sup>68</sup> illustrate the point.

In *Cavazos*, a police officer arrested the defendant's brother for disorderly conduct after a heated argument in a tavern. Afterward, the defendant began to yell at the police officer as he was placing handcuffs on her brother. The defendant came to the front of the gathering crowd and yelled at the officer again, calling him an "asshole." The officer told the defendant to be quiet, but she loudly persisted.<sup>69</sup> The defendant was arrested for disorderly conduct.<sup>70</sup> Her conviction was reversed by the Second District Indiana Court of Appeals.<sup>71</sup>

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<sup>62</sup>457 N.E.2d at 234.

<sup>63</sup>*Id.* (citing *Smart v. State*, 244 Ind. 69, 190 N.E.2d 650 (1963)).

<sup>64</sup>457 N.E.2d 211 (Ind. 1983).

<sup>65</sup>*Id.* at 213-14 (citing *Abbott v. State*, 175 Ind. App. 365, 371 N.E.2d 721 (1978); *Burgett v. State*, 161 Ind. App. 157, 314 N.E.2d 799 (1974)).

<sup>66</sup>Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 411 (1951).

<sup>67</sup>455 N.E.2d 618 (Ind. Ct. App. 1983).

<sup>68</sup>459 N.E.2d 426 (Ind. Ct. App. 1984).

<sup>69</sup>455 N.E.2d at 619.

<sup>70</sup>The disorderly conduct charge was based on IND. CODE § 35-45-1-3(2) (1982): "A person who recklessly, knowingly, or intentionally . . . makes unreasonable noise and continues to do so after being asked to stop . . . commits disorderly conduct, a Class B misdemeanor." *Id.*

<sup>71</sup>455 N.E.2d at 621.

The sole issue on appeal was whether or not there was sufficient evidence to support a conviction for disorderly conduct. The elements of that offense are: (1) recklessly, knowingly, or intentionally; (2) making unreasonable noise; (3) which continues; (4) after being asked to stop.<sup>72</sup> In this case, the defendant yelled at the arresting officer, was told to be quiet, continued to yell at the officer, called him an asshole, was again told to be quiet, and still continued yelling. The only issue before the court was whether or not the noise was unreasonable. The court of appeals noted that speech punished by a disorderly conduct statute must fall into one of the four categories of speech unprotected by the constitutional guarantee of freedom of speech—obscenity, fighting words, public nuisance speech, or an incitement to imminent lawless action.<sup>73</sup>

The court of appeals easily rejected a theory that the defendant's language rose to the level of obscenity.<sup>74</sup> The court also said that the noise did not constitute a public nuisance that invaded privacy interests. Although the defendant's speech was loud, the court said, "Evidence of loudness, standing by itself, does not constitute evidence of unreasonable noise in the public nuisance sense."<sup>75</sup> Whether the loudness was unreasonable must be determined from the surrounding circumstances. The noise at issue was made in a bar with a band playing fifty feet away, and there was no evidence that the defendant spoke louder than anyone else or louder than was necessary to be heard. Therefore, the court concluded that the speech was not unreasonable noise in the public nuisance sense.<sup>76</sup> Nor was the defendant's speech an incitement to immediate lawless action. Although the defendant's conduct agitated the crowd, the court said there was no evidence that her speech was "directed to inciting or producing imminent lawless action and [was] likely to incite or produce such action."<sup>77</sup>

The remaining form of constitutionally unprotected speech, fighting words, drew the most attention from the court. The basic definition of "fighting words" is words "which by their very utterance . . . inflict injury or tend to incite an immediate breach of the peace."<sup>78</sup> According

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<sup>72</sup>*Id.* at 619.

<sup>73</sup>*Id.* at 620 (citing *Hess v. Indiana*, 414 U.S. 105 (1973)). The majority emphasized, "we are *assuming* and *do not decide* 'unreasonable noise' as used in [IND. CODE §] 35-45-1-3(2) criminalizes the foregoing categories of constitutionally unprotected speech." 455 N.E.2d at 620.

<sup>74</sup>455 N.E.2d at 620.

<sup>75</sup>*Id.* at 621.

<sup>76</sup>*Id.* at 620.

<sup>77</sup>*Id.* at 621 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

<sup>78</sup>455 N.E.2d at 619 (quoting *Stults v. State*, 166 Ind. App. 461, 468, 336 N.E.2d 669, 673 (1975)). Another definition of fighting words is "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge,

to the court, "It may be a question of fact whether the words in question constitute 'fighting words.' However, where all reasonable persons would agree the words are not 'fighting words' the question becomes one of law."<sup>79</sup> Because of the free speech element, less deference is paid by an appellate court to the factfinder's determination that the evidence is sufficient to sustain a conviction. The question of sufficiency of the evidence in such cases is a mixed question of law and fact, perhaps more so than for any other criminal offense. The majority methodically evaluated the facts to decide whether or not the defendant's speech constituted fighting words. The defendant's original outburst, that the officer had a grudge against her brother and had no right to arrest him, was not considered to be fighting words because, as a matter of law, they could not reasonably provoke a listener to violent action.<sup>80</sup> Additionally, as a matter of law, the term "asshole" is not so inflammatory that when addressed to an ordinary citizen it is inherently likely to provoke violent action. The court stated, "While the word is indeed derogatory, it does not describe, reference, or characterize national origin, race, religion, sex, or parentage, categories into which fighting words now commonly fall."<sup>81</sup> Finally, even if the word "asshole" were considered a fighting word, it could not support a conviction for disorderly conduct because the speech preceding or following it was not unreasonable noise.<sup>82</sup>

The second disorderly conduct case, *Mesarosh v. State*,<sup>83</sup> also focused on words spoken by a bystander as he objected to the arrest of another person. After the defendant's companion was arrested, both he and the defendant began to shout loudly and profanely.<sup>84</sup> A crowd gathered to watch, and although some of the spectators may have been shouting, no one attempted to interfere with the arrest.

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inherently likely to provoke violent action." 455 N.E.2d at 619 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

<sup>79</sup>455 N.E.2d at 619.

<sup>80</sup>*Id.* at 619-20.

<sup>81</sup>*Id.* at 620.

<sup>82</sup>*Id.* Chief Judge Buchanan wrote a vigorous dissent. In it he contended that the word "asshole" was a fighting word and thus unprotected speech. *Id.* at 622. In addition, because the defendant disobeyed the officer's order to be quiet after uttering the "fighting word," the dissent would have permitted an inference of unreasonable noise even without testimony as to the specific content of her second outburst. *Id.* Finally, Judge Buchanan stated that even before the defendant used the word "asshole" she had spoken fighting words because of the circumstances in which they were uttered. *Id.*

<sup>83</sup>459 N.E.2d 426 (Ind. Ct. App. 1984).

<sup>84</sup>The defendant shouted, "Look at this shit going on here." Brief for Appellant at 4, *Mesarosh v. State*, 459 N.E.2d 426 (Ind. Ct. App. 1984). "[F]uck you pigs, all you want to do is pick on us, we're going to get your ass. I'm going to see you in court. I'll get you mother fuckers, you son-of-a-bitches." Brief for Appellant at 5, *Mesarosh v. State*, 459 N.E.2d 426 (Ind. Ct. App. 1984).

The defendant was arrested and convicted of disorderly conduct for making unreasonable noise after being asked to stop.<sup>85</sup> The fourth district court of appeals agreed with the second district's analysis in *Cavazos* that there are four basic categories of unprotected speech which may be punished criminally.<sup>86</sup> However, unlike *Cavazos*, the *Mesarosh* court affirmed the disorderly conduct conviction on the "fighting words" theory.<sup>87</sup> The fourth district stated that fighting words are "'personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent action.'"<sup>88</sup> The words must be a face to face personal insult, and a determination of whether the words are personally abusive must be based on an objective rather than a subjective standard.<sup>89</sup> The fourth district compared the second district's *Cavazos* case, but said it would apply the dissent's rationale and hold that the speech in *Mesarosh* crossed the line into constitutionally unprotected expression.<sup>90</sup>

In both *Cavazos* and *Mesarosh*, the alleged "unreasonable noise" was created by the defendants' objections to the arrests of others. The "noise" in both cases was directed at police officers. Both defendants employed unfavorably descriptive terms when insulting the police officers. Both used words which would probably, even today, be considered profane, although the speech was not obscene. This is where the similarities end. The defendant in *Mesarosh*, in simple numbers, used more profanity than did the defendant in *Cavazos*. Additionally, if there can be degrees of offensive language, the language in *Mesarosh* was probably worse. The shouting in *Mesarosh* occurred outside a building, apparently with enough volume to draw spectators from other buildings. The shouting in *Cavazos* occurred in a noisy bar. Therefore, from a nuisance speech standpoint, the noise in *Mesarosh* was far more likely to be unreasonable noise. Judge Young's concurring opinion in *Mesarosh* appears correct on this point. Also, in the context of all the facts in *Mesarosh*, the speech was probably not an incitement to imminent lawless action. The shouting occurred in the open street, apparently with more

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<sup>85</sup>459 N.E.2d at 427. The defendant's conviction was based on the same statute discussed in *Cavazos*. See *supra* text accompanying note 70.

<sup>86</sup>459 N.E.2d at 427-28.

<sup>87</sup>*Id.* at 430.

<sup>88</sup>*Id.* at 428 (quoting *Commonwealth v. A Juvenile*, 368 Mass. 580, 591, 334 N.E.2d 617, 624-25 (1975) (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971))).

<sup>89</sup>459 N.E.2d at 428.

<sup>90</sup>*Id.* at 429-30. In a separate concurrence, Judge Young wrote that the conduct in *Mesarosh* was disorderly simply because the noise was unreasonably loud. *Id.* at 430. "[T]he content of the loud noise is irrelevant. A person could violate the statute by reading the scriptures in an unreasonably loud manner. This is not an obscenity case." *Id.*

than one police officer present, and many of the spectators merely watched.

The same, however, cannot be said of the facts in *Cavazos*, where a lone police officer was attempting to arrest a person in a confined area in a bar at one o'clock in the morning while the arrestee's sister shouted at him. Indeed, the officer in *Cavazos* was assaulted. The majority in *Cavazos* emphasized that the defendant's speech was not "directed to" inciting immediate lawless action: "She was simply arguing with a policeman about whether her brother should be arrested."<sup>91</sup> The *Cavazos* court failed to recognize that speech can be an incitement to immediate lawless action even if the speaker does not literally say "Let's riot!" On the other hand, the state ought not punish as disorderly conduct a speech like Marc Antony's "Friends, Romans, countrymen"<sup>92</sup> address simply because it eventually does lead to a riot. But if Marc Antony delivered his oration in the closed quarters of a bar at one o'clock in the morning where one individual representing authority is surrounded by eight intoxicated persons, a different conclusion would be warranted. While the court in *Cavazos* insisted that nuisance speech must be considered in the entire context in which it is delivered, the context of the speech was virtually ignored when determining whether or not it was an incitement to immediate lawless action. Furthermore, as was pointed out by the fourth district in *Mesarosh*, it is not always easy to pigeonhole speech in one category or another; there is often a substantial overlap between the imminent lawless action and fighting words exceptions.<sup>93</sup>

Viewing these cases, it is easy to see how a defendant might claim that the disorderly conduct statute is unconstitutionally vague.<sup>94</sup> During the last year, the first district court of appeals avoided that question, but did hold that an indictment or information alleging that the defendant committed disorderly conduct by engaging in "tumultuous conduct"<sup>95</sup> must allege the specific facts which comprise the tumultuous conduct.<sup>96</sup> A prosecuting attorney would be well advised to also specifically allege

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<sup>91</sup>455 N.E.2d at 621.

<sup>92</sup>W. SHAKESPEARE, *The Tragedy of Julius Caesar*, THE COMPLETE SIGNET CLASSIC SHAKESPEARE 825 (2d ed. 1972).

<sup>93</sup>459 N.E.2d at 428 n.3. Indiana's provocation statute, IND. CODE § 35-42-2-3 (1982), would seem to specifically punish fighting words. In *Evans v. State*, 434 N.E.2d 940 (Ind. Ct. App. 1982), the court of appeals interpreted the provocation statute in light of the fighting words doctrine.

<sup>94</sup>Kerr, *Foreward: Indiana's Bicentennial Criminal Code*, 1975 Survey of Recent Developments in Indiana Law, 10 IND. L. REV. 1, 26 (1976). Indiana's former disorderly conduct statute was upheld against a void-for-vagueness attack in *Hess v. State*, 260 Ind. 427, 297 N.E.2d 413 (1973), *rev'd on other grounds*, 414 U.S. 105 (1973).

<sup>95</sup>IND. CODE § 35-45-1-3(1) (1982).

<sup>96</sup>*Gebhard v. State*, 459 N.E.2d 58, 61 (Ind. Ct. App. 1984).

the conduct which constitutes unreasonable noise when alleging disorderly conduct under that subsection.<sup>97</sup>

5. *Homicide*.—Several decisions during the survey period clarified the holding of *Head v. State*.<sup>98</sup> In that case, the Indiana Supreme Court held that there can be no crime of attempted felony murder because the specific intent required for an attempt cannot be supplied by the intent necessary to prove the underlying felony.

In *Brown v. State*,<sup>99</sup> the defendant challenged the constitutionality of the felony murder statute<sup>100</sup> on the ground that it dispensed with the need to prove a specific intent to kill. The Indiana Supreme Court stated that the only intent the State must prove is the mens rea for the underlying felony, that the intent to kill is not an element of felony murder and that its absence did not render the statute unconstitutional.<sup>101</sup> While the *Head* decision may have held that there is no crime of attempted felony murder, the court in *Brown* said this would not be extended to mean that the felony murder statute itself was unconstitutional.

The Indiana Supreme court addressed a related sentencing issue in *Anderson v. State*.<sup>102</sup> In that case, the defendant was convicted of attempted murder and armed robbery and sentenced for both offenses. He contended that this was error because the robbery was the underlying felony for attempted murder and should have merged into it for sentencing purposes. Indiana case law holds that an underlying felony sentence merges into the sentence for felony murder.<sup>103</sup> The supreme court distinguished this case, however, because the defendant was convicted of *attempted* murder rather than felony murder. Therefore, the merger doctrine did not apply. Nevertheless, the court raised sua sponte the issue of whether the defendant was erroneously convicted of attempted felony murder under the *Head* decision. After reviewing the charging information, the court found that the defendant had been charged correctly with an attempted "knowing" murder rather than attempted felony murder.<sup>104</sup>

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<sup>97</sup>IND. CODE § 35-45-1-3(2) (1982).

<sup>98</sup>443 N.E.2d 44 (Ind. 1982). For a complete discussion of the case, see Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 127-28 (1984).

<sup>99</sup>448 N.E.2d 10 (Ind. 1983).

<sup>100</sup>IND. CODE § 35-42-1-1(2) (1982) provides: "A person who . . . kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery; commits murder, a felony." *Id.*

<sup>101</sup>448 N.E.2d at 15.

<sup>102</sup>448 N.E.2d 1180 (Ind. 1983).

<sup>103</sup>*Id.* at 1187 (citing *Biggerstaff v. State*, 432 N.E.2d 34, 37 (Ind. 1982); *Williams v. State*, 267 Ind. 700, 703, 373 N.E.2d 142, 144 (1978); *Chandler v. State*, 266 Ind. 440, 458, 363 N.E.2d 1233, 1243 (1977)).

<sup>104</sup>448 N.E.2d at 1187.

In *Taylor v. State*,<sup>105</sup> the Indiana Court of Appeals evaluated the sufficiency of evidence supporting a reckless homicide conviction based on an automobile accident. The evidence indicated that the defendant ran a stop sign while driving forty miles an hour more than the posted limit and struck another vehicle, killing the driver and a passenger in that car. The defendant testified that he had consumed two beers on the day of the collision. He was charged with reckless homicide and driving while intoxicated.<sup>106</sup>

The defendant was acquitted of driving while intoxicated. The definition of "intoxicated" under the applicable statute<sup>107</sup> described intoxication as being under the influence of intoxicants "such that there is an impaired condition of thought and action and the loss of normal control of a person's faculties to such an extent as to endanger any person."<sup>108</sup> The court of appeals held that the acquittal meant that the defendant's consumption of beer was totally irrelevant to the question of whether the defendant acted recklessly.<sup>109</sup>

The remaining facts that could be weighed in the recklessness equation focused almost exclusively on the issue of excessive speed. The court of appeals said it could consider "only the fact that Taylor was driving approximately forty miles per hour over the posted speed limit in determining whether he acted recklessly."<sup>110</sup> The issue had not been directly answered by the trial court. Nevertheless, the court of appeals concluded that driving forty miles an hour over the posted limit constituted recklessness.<sup>111</sup> The court found support in the reckless driving statute, which partially defines that offense as driving at "such an unreasonably high rate of speed . . . under the circumstances, as to endanger the safety or the property of others."<sup>112</sup> The court stated:

Initially, it would appear the Reckless Driving statute is of minimal assistance in resolving the issue before us, given the use therein of the word "recklessly." We believe, however, that the adverb "recklessly" was employed to lend flexibility to the operation of the statute. As we interpret the statute, Reckless Driving may be based on any one of the enumerated acts, but

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<sup>105</sup>457 N.E.2d 594 (Ind. Ct. App. 1983).

<sup>106</sup>*Id.* at 596-97.

<sup>107</sup>The defendant was charged under IND. CODE § 9-4-1-54 (1982), which was repealed in 1983 when Indiana's drunk driving laws were substantially revised. See Johnson, *supra* note 98, at 116.

<sup>108</sup>IND. CODE § 9-11-1-5 (Supp. 1984).

<sup>109</sup>457 N.E.2d at 597. The court of appeals also criticized the trial court's comments at sentencing, in which the trial judge stated his belief that the defendant was a drunken driver. *Id.* at 597 n.5.

<sup>110</sup>*Id.* at 597 (footnote omitted).

<sup>111</sup>*Id.* at 598.

<sup>112</sup>*Id.* (quoting IND. CODE § 9-4-1-5.6-1 (Supp. 1984)).

proof thereof creates a presumption of recklessness which the defendant may rebut. Therefore, in certain circumstances, operating a motor vehicle at an "unreasonably high rate of speed" may be sufficient to support a conviction of Reckless Driving.<sup>113</sup>

Although the court of appeals said that operating a vehicle at an unreasonably high rate of speed might support a conviction of "Reckless Driving," it seems obvious from the context that the court meant to say "reckless homicide." Because the reckless driving statute itself specifically prohibits an unreasonably high rate of speed, it would be a non sequitur to simply declare that unreasonable speed would be reckless driving. The court said that failure to adhere to the speed limit does not necessarily constitute recklessness, because a slight deviation from the limit would not create a great risk of danger. The court also pointed out that the legislature had not defined "unreasonably high rate of speed." Yet the court declared that a speed in excess of the speed limit by forty miles an hour was unreasonable and reckless. Added to the high rate of speed were the facts that the pavement was wet and that the defendant was unfamiliar with the area. The court of appeals also stated that its determination of recklessness would stand absent the reckless driving statute, since the defendant satisfied the general intent necessary to support a conviction for reckless homicide.<sup>114</sup>

Although the court of appeals held that the evidence was sufficient to sustain a reckless homicide conviction, it reversed the conviction because the trial court had prohibited the defense counsel's final argument to the jury regarding the difference between negligence and recklessness. The trial court ruled that such arguments were irrelevant. The court of appeals disagreed, stating that the discussion would have aided the jury in its deliberations.<sup>115</sup> A close examination of *Taylor* reveals a number of interesting aspects. At first, the court seemed to say that excessive speed, by itself, will support a finding of reckless conduct. At the same time, however, the court pointed out that the road was wet and the defendant was unfamiliar with the area. One must conclude that the recklessness of the speed is measured not simply by miles an hour exceeding the limit, but also by the driving conditions. Nor is the recklessness of the speed determined solely by whether or not it exceeds a posted speed limit. Driving slightly faster than the speed limit, without more, would not indicate recklessness. One would reasonably suppose that driving within a posted speed limit would not *necessarily* indicate the absence of reckless conduct. For example, a driver could maintain

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<sup>113</sup>457 N.E.2d at 598.

<sup>114</sup>*Id.* The intent element for reckless homicide was defined as "a choice of action, either with the knowledge of serious danger to others involved therein or with the knowledge of facts which would disclose danger to a reasonable person." *Id.* (citations omitted).

<sup>115</sup>*Id.* at 599-600.

the fifty-five miles an hour speed limit on an icy road where traffic was heavy. This would certainly be reckless conduct. The court's opinion in *Taylor* suggests that the recklessness of the driver's conduct must be determined by all of the surrounding circumstances.

The *Taylor* decision initially appears to adopt a rule equivalent to "recklessness per se": that is, if the State proves an "unreasonably high rate of speed" under the reckless driving statute, the State has at least shown a presumption of recklessness which the defendant must rebut. On the other hand, "unreasonably high rate of speed" seems to be simply a different way to say "recklessness." When the State has proven that a speed was "unreasonable" it has, in effect, made its prima facie proof of recklessness. It is no more of a presumption than exists when the State makes a prima facie case in any other criminal trial.

The *Taylor* decision also indicates that an appellate court might be willing to focus on one particular act, such as the speeding in this case, and sustain a finding of reckless conduct.<sup>116</sup> Previous appellate court decisions had been unwilling to find reckless conduct based on a single factor, such as intoxication, no matter how severe the impairment of driving may have been.<sup>117</sup> This was a very artificial distinction to make, and an extremely restricted way to view the recklessness of conduct.

6. *Neglect.*—In the last year, the Indiana legislature enacted a series of statutes designed to give certain adults the same protection from abuse provided for children.<sup>118</sup> First, a new crime, "exploitation of endangered adult," was created.<sup>119</sup> The battery statute also was amended to upgrade the crime to a Class D felony if bodily injury is inflicted on an endangered adult.<sup>120</sup> The sentencing statute was amended to require a sentencing judge to consider whether the victim of the crime was sixty-

<sup>116</sup>The fact that the defendant also ran a stop sign was ignored in the case, except as a part of the statement of the facts. 457 N.E.2d at 596.

<sup>117</sup>*Compare* Williams v. State, 423 N.E.2d 598 (Ind. 1981) (blood alcohol level of .37 alone was insufficient evidence of criminal recklessness) with Carter v. State, 424 N.E.2d 1047 (Ind. Ct. App. 1981) (evidence of intoxication combined with excessive speed and weaving off both sides of the road was sufficient evidence of reckless homicide); Salrin v. State, 419 N.E.2d 1351 (Ind. Ct. App. 1982) (.36 blood alcohol level plus crossing center line twice sufficient evidence of reckless driving).

<sup>118</sup>See *supra* note 17 and accompanying text.

<sup>119</sup>Act of Feb. 24, 1984, Pub. L. No. 185-1984, § 3, 1984 Ind. Act 1501, 1503 (codified at IND. CODE § 35-46-1-12 (Supp. 1984)). The statute provides, in part, "[a] person who recklessly, knowingly, or intentionally exerts unauthorized use of the personal services of the property of: (1) an endangered adult . . . for one's own profit or advantage, or for the profit or advantage of another, commits exploitation of . . . [an] endangered adult, a Class A misdemeanor." IND. CODE § 35-46-1-12 (Supp. 1984).

<sup>120</sup>Act of Feb. 24, 1984, Pub. L. No. 185-1984, § 1, 1984 Ind. Acts 1501, 1502 (codified at IND. CODE § 35-42-2-1(2)(E) (Supp. 1984)).

five years of age or older.<sup>121</sup> Finally, persons who are aware of adult abuse are now required to report that fact.<sup>122</sup>

It was in this year of heightened awareness of the problem of adult abuse that the first case of adult neglect was decided. *Bean v. State*<sup>123</sup> was based on a "very sordid story"<sup>124</sup> of the abuse and neglect of an adult incompetent that resulted in her death. One defendant, Judy Bean, was the victim's legal guardian. She was eventually convicted of voluntary manslaughter and neglect and received consecutive sentences of twenty years and four years. The other defendant was her husband, Raymond Bean. Although Raymond Bean was not a legal guardian of the victim, he was convicted of involuntary manslaughter and neglect and received consecutive sentences of eight and four years. Both of the defendants were prosecuted for neglect of a dependent.<sup>125</sup> The defendant husband contended that he could not be prosecuted for neglect because, unlike his wife, he was not an appointed legal guardian of the victim. The supreme court, however, emphasized that the neglect statute

clearly provides that one who has the *care, custody, or control* of a dependent may be held liable for acts that constitute neglect of a dependent. . . . There is no requirement in [Indiana Code section] 35-46-1-4 that the person charged with the crime be the legal guardian or natural parent of the child or incompetent adult.<sup>126</sup>

According to the court, it was clear that the husband knew that the victim was a dependent and that both he and his wife were concerned with the care, custody, and control of the victim. Indeed, the court found that the husband at times exerted "abusive control" over the victim, and that his neglect was not merely passive.<sup>127</sup> Alternatively, the court found that the defendant could also have been convicted of neglect as his wife's accomplice.<sup>128</sup>

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<sup>121</sup>Act of Feb. 24, 1984, Pub. L. No. 181-1984, § 1, 1984 Ind. Acts 1489 (codified at IND. CODE § 35-38-1-7 (a)(4) (Supp. 1984)).

<sup>122</sup>Act of Feb. 24, 1984, Pub. L. No. 185-1984, § 4, 1984 Ind. Acts 1501, 1503 (codified at IND. CODE § 35-46-1-13 (Supp. 1984)).

<sup>123</sup>460 N.E.2d 936 (Ind. 1984).

<sup>124</sup>*Id.* at 938.

<sup>125</sup>*Id.* The charges were brought under IND. CODE § 35-46-1-4, punishing neglect of a dependent. A "dependent" is defined as "a person of any age who is mentally or physically disabled." IND. CODE § 35-46-1-1 (1982). The "endangered adult" provisions, see *supra* note 17, were not in effect at the time, and it is not clear that the victim would have fit that definition because her age was not reported.

<sup>126</sup>460 N.E.2d at 942.

<sup>127</sup>*Id.*

<sup>128</sup>*Id.* Another important holding in *Bean* was that the husband could be convicted and sentenced for both involuntary manslaughter and neglect. *Id.* at 944. In *Smith v. State*, 408 N.E.2d 614 (Ind. Ct. App. 1980), the Indiana Court of Appeals held that a

Thus, the *Bean* decision clearly indicates that a neglect prosecution may be brought against an accused who is not the parent or legal guardian of the victim. The terms "care, custody, or control" are to be interpreted according to the facts of the particular case, not solely by reference to the legal relationship between the victim and the accused. This is important for family abuse situations like that revealed in *Bean*, also for mental institutions, nursing homes, or other institutions that are entrusted with the care, custody, or control of dependents.

7. *Robbery*.—In *Simmons v. State*,<sup>129</sup> the court of appeals affirmed the defendant's robbery conviction.<sup>130</sup> The facts revealed that the defendant entered a liquor store, approached the manager and demanded money. As the defendant ordered the manager, to open the register, he put his hand to a bulge at his waist. The manager thought he saw the outline of a revolver under the defendant's shirt. The manager handed over the money and the defendant left the store with \$295.<sup>131</sup>

The defendant was charged with robbery by threatening the use of force, rather than with robbery by putting the victim in fear.<sup>132</sup> On appeal, the defendant argued that the evidence was insufficient to show that he threatened the use of force. The court of appeals, however, held that the appearance of having a gun, as observed by the robbery victim, was sufficient to prove "threatening the use of force," regardless of whether the victim was actually put in fear.<sup>133</sup> The court said, "'threatening the use of force' . . . can be measured objectively without having to gauge the victim's reaction,"<sup>134</sup> while "putting in fear" is considered subjectively by looking at the reaction of the victim. In other words, one may rob a hero as well as a coward by threatening the use of force. If a person does not threaten or use force of any kind, but simply takes a victim's property by causing fear in an unduly timid victim, he has committed a different form of robbery. Finally, if the robber meets

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defendant could not be convicted of both manslaughter and neglect where one act of neglect was the underlying crime for both the neglect and manslaughter charges. The supreme court in *Bean* distinguished *Smith* on the ground that the neglect conviction in *Bean* could have been founded on a series of acts that spanned a period of three years, while the manslaughter conviction could have been based on the acts during the last two weeks of the victim's life which led to her death. 460 N.E.2d 942-43.

<sup>129</sup>455 N.E.2d 1143 (Ind. Ct. App. 1983).

<sup>130</sup>*Id.* at 1148. The defendant was charged under IND. CODE § 35-42-5-1 (1982) which provides in part: "A person who knowingly or intentionally takes property from another person or from the presence of another person: (1) by using or threatening the use of force on any person; or (2) by putting any person in fear; commits robbery, a Class C felony." *Id.*

<sup>131</sup>455 N.E.2d at 1144.

<sup>132</sup>See IND. CODE § 35-42-5-1.

<sup>133</sup>455 N.E.2d at 1148.

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

a person with no fear in his heart, and the robber takes his property by force or threat of force, he has again committed a robbery. Force and fear are generally considered alternatives. "[I]f there is force, there need be no fear, and *vice versa*."<sup>135</sup> From an objective viewpoint, a person attempting to steal money who reaches toward a bulge under his shirt at his waist can be seen as threatening the use of force. From a subjective standpoint, a victim might be in fear because of such actions. Under either theory, *Simmons* illustrates that a defendant need not actually display a weapon to threaten force or create fear, nor is it necessary that the threat to use force be spoken.

8. *Theft*.—The law of theft developed significantly during the survey period. One major decision resulted from an investigation into the practices of vehicle transmission repair shops in Marion County. *Harwei, Inc. v. State*<sup>136</sup> contains an illuminating discussion of the crime of theft by creating a false impression. In that case, a prosecutor's employee drove a car to a transmission shop and described the car's mechanical problems to the defendant. Despite the fact that the car was in certifiably good condition, with only one defective gear purposefully placed in the transmission, the defendant stated that the car's clutches and some transmission gears were ruined. They were replaced at a cost of \$194. Two weeks later, a police officer drove a car that was in the same condition to the same shop, where the defendant told him that the transmission was beyond repair. The defendants installed a rebuilt transmission and converter for \$502. Both drivers knew their cars' mechanical defects could have been remedied by replacing a gear without removing the transmission.<sup>137</sup> The defendants were charged with two counts of theft by creating a false impression.<sup>138</sup>

On appeal, the defendants argued that there was insufficient evidence to sustain their theft convictions because the victims in this case knew what was wrong with their transmission, so that a false impression was not created in their minds. The court of appeals agreed, and said that

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<sup>135</sup>W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 94, at 698 (1972) (footnote omitted) [hereinafter cited as LAFAVE & SCOTT].

<sup>136</sup>459 N.E.2d 52 (Ind. Ct. App. 1984).

<sup>137</sup>*Id.* at 54-55.

<sup>138</sup>*Id.* at 55. Theft by creating a false impression is prohibited by IND. CODE § 35-43-4-2 (1982). "Creating a false impression" is contained in the definition of an unauthorized exercise of control over another's property. IND. CODE § 35-43-4-1(b)(4) (1982).

The first set of charges against the defendants alleged that they exerted unauthorized control over the property of the victim by knowingly creating a false impression that the transmissions needed to be replaced when in fact they did not. The second set of similar charges alleged they stated that the defendants knowingly created a false impression when they told the victims that the transmissions had to be completely rebuilt, when they did not. 459 N.E.2d at 55.

if the victim knew the representation was false the crime was not committed.<sup>139</sup> Nevertheless, the court of appeals stated that it is not necessary to show that the intended victim was actually defrauded in order to sustain a conviction for attempting to obtain property by false pretenses.<sup>140</sup> Because the evidence clearly established the defendants' guilt of attempted theft, the court of appeals refused to reverse the convictions and, instead, ordered modification of the judgments to reflect convictions for attempted theft.<sup>141</sup>

The court of appeals correctly stated the traditional rules that a victim of theft by false pretenses must be actually deceived,<sup>142</sup> and that the offense of attempted theft by false pretenses may be present even though the victim is not deceived.<sup>143</sup> The case operates as a reminder to prosecutors to carefully select the charge filed and reminds courts that juries should be instructed on the law of attempt and reliance by the victim under facts similar to *Harwei*. The penal consequences of the distinction between theft and attempted theft are nonexistent, however, because an attempt is punished with the same penalty as the completed crime.<sup>144</sup>

*State v. McGraw*<sup>145</sup> was another significant theft case decided in the last year. The defendant, a computer operator for the city of Indianapolis, used a computer leased by the city to conduct his private business. After the city discharged the defendant, he made a printout of the extensive business data contained in the city's computer and then erased it from the computer's memory. McGraw was convicted on two counts of theft for unauthorized use of computer services. Prior to sentencing, the defendant renewed his motion to dismiss on the ground that the charge failed to state an offense. The trial court sustained the motion.<sup>146</sup>

On appeal, the defendant contended that because the theft statute was divided into a conduct section and an intent section, the prohibited

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<sup>139</sup>459 N.E.2d at 57.

<sup>140</sup>*Id.*

<sup>141</sup>*Id.* at 58. In a very similar case brought under a similar theft statute, the Kentucky Supreme Court held that reliance by the victim was an essential element of theft. *Brown v. Commonwealth* 656 S.W.2d 727 (Ky. 1983). In that case, the repair shop installed a transmission of dubious value rather than repairing it as represented. The Kentucky court held this second misrepresentation was sufficient to sustain a conviction. 656 S.W.2d at 728. A three-member concurrence stated that reliance should no longer be an element of theft: "It is the state of mind of the criminal, not the victim, which the statute denounces." *Id.* (Gant, Leibson, & Wintersheimer, JJ., concurring).

<sup>142</sup>See LAFAYE & SCOTT, *supra* note 135, at 659-60 (1979); R. PERKINS, *CRIMINAL LAW* 308-09 (2d ed. 1969).

<sup>143</sup>LAFAYE & SCOTT, *supra* note 135, at 659-60 (1979).

<sup>144</sup>IND. CODE § 35-41-5-1(a) (1982).

<sup>145</sup>459 N.E.2d 61 (Ind. Ct. App. 1984).

<sup>146</sup>*Id.* at 62-63.

“unauthorized control” could only be exercised over the property itself and not over the “use” of that property. The defendant claimed that the definition of “exert control over property” found in the theft statute<sup>147</sup> does not include the term “use.” He argued that the term “services” contained in the statutory definition of property<sup>148</sup> was limited to labor, and that he could not deprive the city of the “use” of the computer unless his data caused an overload on the computer memory banks, or unless he used the computer for his private business at a time when he interfered with city’s use.

The Indiana Court of Appeals concluded that the defendant’s unauthorized use of another’s computer for his own private business was theft and reversed the trial court’s order of dismissal.<sup>149</sup> *McGraw* appears to be the only decision in the United States to declare the unauthorized use of computer time to be theft under a general theft statute. Other jurisdictions have held that the actual stealing of computer programs is theft.<sup>150</sup> Courts from two other states have found that the unauthorized use of computer time was not a criminal offense, but these decisions were based on much more narrowly written statutes.<sup>151</sup> The *McGraw* court discussed Indiana’s theft statute in the computer use context:

Computer services, leased or owned, are a part of our market economy in huge dollar amounts. Like cable television, computer services are “. . . anything of value” [sic]. Computer time is “services” for which money is paid. Such services may reasonably be regarded as valuable assets to the beneficiary. Thus, computer services are property within the meaning of the definition of property subject to theft. When a person “obtains” or “takes” those services, he has exerted control under [Indiana Code section] 34-43-4-1(a). Taking without the other person’s consent is

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<sup>147</sup>IND. CODE § 35-43-4-1(a) (1982) provides, “As used in this chapter, ‘exert control over property’ means to obtain, take, carry, drive, lead away, conceal, abandon, sell, convey, encumber, or possess property, or to secure, transfer, or extend a right to property.”

<sup>148</sup>IND. CODE § 35-41-1-2 (1982) (codified as amended at IND. CODE § 35-41-1-23 (Supp. 1984)).

<sup>149</sup>459 N.E.2d at 65.

<sup>150</sup>See, e.g., *National Sur. Corp. v. Applied Sys., Inc.*, 418 So. 2d 847 (Ala. 1982); *Hancock v. State*, 402 S.W.2d 906 (Tex. Crim. App. 1966).

<sup>151</sup>See *People v. Weg*, 113 Misc. 2d 1017, 450 N.Y.S.2d 957 (N.Y. City Crim. Ct. 1982) (computer failed to qualify as business, commercial, or industrial equipment under theft statute); *Lund v. Commonwealth*, 217 Va. 688, 232 S.E.2d 745 (1977) (computer time not included within phrase “goods and chattels” in larceny statute). Some states have recently enacted specific computer theft or computer trespass statutes. See IDAHO CODE § 18-2201 (1984); KY. REV. STAT. §§ 434.840 to -.860 (1984); OKLA. STAT. tit. 21, §§ 1951 to -1956 (Supp. 1984); VA. CODE §§ 18.2-152.1 to -152.14 (Supp. 1984).

unauthorized taking. [Indiana Code section] 35-43-4-1(b)(1). Depriving the other person of any part of the services' use completes the offense. [Indiana Code section] 35-43-4-2(a).<sup>152</sup>

The Indiana legislature significantly augmented theft law when it enacted the offense of committing fraud on a financial institution.<sup>153</sup> This law prohibits one from obtaining bank property by false pretenses. The principal reason behind the legislation was probably to ensure that the practice of check kiting would be a punishable criminal offense.<sup>154</sup> A

<sup>152</sup>459 N.E.2d at 65. The court said:

Property must be shown to have a value, however slight, but the monetary value of property is of no concern, and the jury may under proper instructions infer some value. . . . The theft statute comprehends a broad field of conduct . . . and does not limit the means or methods by which unauthorized control of property may be obtained. . . . We disagree that specific prohibition to exerting control is necessary to support the conviction theft. . . . Further, we disagree that it is a defense to exerting unauthorized control that the owner was not using the property at the time.

*Id.* (citations omitted).

<sup>153</sup>Act of Mar. 1, 1984, Pub. L. No. 187-1984, § 1, 1984 Ind. Acts 1504 (codified at IND. CODE § 35-43-5-8 (Supp. 1984)). The new law provides:

(a) A person who knowingly executes, or attempts to execute, a scheme or artifice:

- (1) To defraud a state or federally insured financial institution; or
- (2) To obtain any of the money, funds, credits, assets, securities, or other property owned by or under the custody or control of a state or federally chartered or federally insured financial institution by means of false or fraudulent pretenses, representations, or promises;

commits a Class C felony.

(b) As used in this section, the term "state or federally chartered or federally insured financial institution" means:

- (1) a bank with deposits insured by the Federal Deposit Insurance Corporation;
- (2) an institution with accounts insured by the Federal Savings and Loan Insurance Corporation;
- (3) a credit union with accounts insured by the National Credit Union Administration Board;
- (4) a federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal Home Loan Bank System; or
- (5) a bank, banking association, land bank, intermediate credit bank, bank for cooperatives, production credit association, land bank association, mortgage association, trust company, savings bank, or other banking or financial institution organized or operating under the laws of the United States or of the state.

IND. CODE § 35-43-5-8 (Supp. 1984).

<sup>154</sup>The practice of check kiting was described best in *Baskerville v. State*, 23 Md. App. 439, 327 A.2d 918, (1974):

typical check kiting scheme could have been successfully prosecuted under prior Indiana laws. For example, under the general theft statute, a check kiter would be knowingly or intentionally exerting "control over property of another person, with intent to deprive the other person of any part of its value or use."<sup>155</sup> The "other person" would be the bank involved. The "property" would be either "money," an "extension of credit," or simply "a gain or advantage or anything that might reasonably be regarded as such by the beneficiary."<sup>156</sup> The control over the property would be "unauthorized" because the check kiter would either be "creating or confirming a false impression in the other person" or "promising performance that the person knows will not be performed."<sup>157</sup> Similarly, kiting activities could be punished under the check deception statute.<sup>158</sup> The practical problem encountered under both statutes, however, is the ten-day notice provision. Under the theft statute, no crime is committed if a person who writes an insufficient funds check pays the bank the amount due, plus protest fees, within ten days after receiving notice that the check has not been paid.<sup>159</sup> Under the check deception statute, it is a defense if the check is paid within ten days.<sup>160</sup> If a check kiter received notice that his scheme has fallen through, he would quite likely

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Assume that a defendant, or his confederate, has an account at Bank A with only a nominal balance. On Monday, a check is written to the defendant in the amount of \$100. The defendant immediately walks to Bank B, where he has an account and is known as a reliable customer, and cashes the check for \$100. The check now in the hands of Bank B does not, of course, clear on that particular day and the defendant has created for himself \$100 out of nothing. To keep the scheme afloat, a second check is drawn on Bank A on Tuesday. It then is cashed at Bank B and the cash is, in turn, redeposited at Bank A. The deposit covers the check written on Monday, which is just now clearing. Tuesday's check has not yet been covered. The scheme is repeated on Wednesday Thursday and Friday. At the end of the week, five \$100 checks, totaling \$500, have been written on Bank A. The five checks have been cashed at Bank B for \$500. Four hundred dollars has been redeposited at Bank A to keep the scheme afloat. The remaining \$100 is the profit of the "kiting" operation.

*Id.* at 440, 327 A.2d at 919-20.

See also *Denby v. State*, 654 S.W.2d 457 (Tex. Crim. App. 1983); *Phillips v. State*, 604 S.W.2d 904 (Tex. Crim. App. 1979); *State v. Copening*, 103 Wis. 2d 564, 309 N.W.2d 850 (1981).

<sup>155</sup>IND. CODE § 35-43-4-2 (1982).

<sup>156</sup>IND. CODE § 35-41-1-23(a)(1) (Supp. 1984).

<sup>157</sup>IND. CODE § 35-43-4-1(b)(4), (6) (1982).

<sup>158</sup>IND. CODE § 35-43-5-5 (1982). See also *Borton v. State*, 230 Ind. 679, 106 N.E.2d 392 (1952); *Huffman v. State*, 205 Ind. 75, 195 N.E. 131 (1933).

<sup>159</sup>IND. CODE § 35-43-4-5(b) (1982).

<sup>160</sup>IND. CODE § 35-43-5-5 (1982). See *Suits v. State*, 451 N.E.2d 375 (Ind. Ct. App. 1983) (payment was absolute defense; state must prove notice of dishonor of check was sent).

flee the jurisdiction or he would pay the amount due on his checks and claim either that no crime was committed or that he had an absolute defense. Apparently, the legislature intended to protect persons who inadvertently overdrew their account, not check kitters, by adopting the ten-day notice provisions. The ten-day notice statutes, however, would create a problem in any check kiting prosecution under the theft or check deception statutes.

Under the new defrauding a financial institution law, there is no ten-day notice provision.<sup>161</sup> Instead, the statute returns to the crime of false pretenses. Thus, it is appropriate to examine how the act of check kiting will be prosecuted as a false pretense under the new statute. The essential elements of the crime of false pretenses are: (1) making a false representation of a past or existing fact; (2) with intent to defraud; and (3) with knowledge of its falsity; (4) to obtain any chattel, money, or valuable security from another; (5) who relies on the false representation; (6) to his detriment.<sup>162</sup> Most of these elements are present in a check kiting scheme: The check kiter knowingly makes a false representation as to a past or existing fact, that there are funds in the account of the drawee bank to cover the check; the banks rely upon the false representation when they part with their money or "credit." The remaining elements are more difficult to prove. The check kiter would argue that there was no detriment to the second bank used because the money was on a deposit in the first bank in time for the early checks in the scheme to clear. Until the last check bounces, the check kiter could contend that there has been no detriment. Yet, according to the common law of false pretenses, it is enough of a detriment that the second bank exposed itself to a hazard that it would not have assumed but for the reliance.<sup>163</sup>

The second element which may present difficulties of proof is that of intent to defraud. The check kiter may claim that although he made an unearned profit from his original false representation, each succeeding representation was for the noble purpose of reimbursing the bank for his original false representation. This argument's fallacy is that the check kiter receives an intended benefit from the later transactions that cover his earlier criminality. The check kiter may also claim that he had no intent to defraud because the scheme was merely an attempt to borrow money, that there was no intent to steal and that he intended to pay

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<sup>161</sup>IND. CODE § 35-43-5-8 (Supp. 1984).

<sup>162</sup>Baskerville v. State, 23 Md. App. 439, 440, 327 A.2d 918, 920 (1974). The Indiana Court of Appeals interpreted the general theft statute in terms of traditional false pretenses law in *Harwei v. State*, 459 N.E.2d at 52. See *supra* notes 136-43 and accompanying text.

<sup>163</sup>Baskerville v. State, 23 Md. App. 439, 443, 327 A.2d 918, 921 (1974).

back every cent.<sup>164</sup> To defeat this argument, the new defrauding financial institutions statute does not require an intent to *permanently* deprive the victim of his property.

### B. Criminal Procedure

1. *Arrest, Search, and Seizure.*—*a. Detentions for Obtaining Identifying Physical Evidence.*—One of the most significant developments in the state's law of arrest, search, and seizure came in the area of detention for the limited purpose of obtaining identifying physical evidence, such as a photograph or fingerprints. In *Baker v. State*,<sup>165</sup> the Indiana Supreme Court held that the defendant's fourth amendment rights were not violated when he was detained on a warrant issued for the sole purpose of obtaining fingerprints and a photograph of him. Consequently, testimony regarding a victim's photographic identification of the defendant was held to have been properly admitted.<sup>166</sup>

As part of an investigation of multiple rapes, one victim viewed photographs of possible suspects. She tentatively identified the defendant as her assailant from a poor quality photograph and told police she could make a more positive identification from a clearer photograph. Another witness said the same. Acting upon this information, a police officer presented a probable cause affidavit to a judge, "requesting an arrest warrant be issued for [the defendant] 'pursuant to *Davis v. Mississippi*.'" <sup>167</sup> The affidavit recited the facts surrounding the rape, the victim's description of her assailant, the fact that she had chosen the defendant's photograph but could not be sure due to the photograph's poor quality, and the fact that another witness was similarly unable to make a positive identification. The court found probable cause and issued an arrest warrant for the sole purpose of fingerprinting and photographing the defendant.<sup>168</sup> The warrant directed that the suspect be released immediately after the identification evidence was gathered. The police complied with the warrant's restrictions. Three rape victims positively identified the defendant from a photographic display containing

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<sup>164</sup>*Id.* at 445, 327 A.2d at 922.

<sup>165</sup>449 N.E.2d 1085 (Ind. 1983).

<sup>166</sup>*Id.* at 1090.

<sup>167</sup>*Id.* at 1089 (citing *Davis v. Mississippi* 394 U.S. 721 (1969)).

<sup>168</sup>The arrest warrant was issued upon the court's finding of "sufficient and probable cause under *Davis v. Mississippi*" 449 N.E.2d at 1089 (quoting the trial court) presented an unfortunate choice of words when used with reference to *Davis*. The significance of *Davis* was the Supreme Court's suggestion, in dictum, that the fourth amendment could be complied with on less than traditional probable cause when certain identification evidence was sought. 394 U.S. 721, 728. Apparently, the Indiana court meant the warrant it issued was based on some quantum of probable cause less than that for the traditional probable cause for arrest.

the defendant's new photograph.<sup>169</sup> The Indiana Supreme Court said that the probable cause affidavit was sufficient to support the warrant and held that "the procedure used to procure appellant's photograph for identification purposes did not violate the Fourth Amendment."<sup>170</sup>

Several months later, the Indiana Supreme Court decided *Spikes v. State*,<sup>171</sup> another multiple-victim rape case. Within a two day period, two women who were raped in the same area. Both victims provided descriptions to the police. One of the women, who was also robbed, reported that her assailant had opened a cookie jar in her home before he fled. Latent fingerprints were taken from the jar. Local police officers were told of the recent rapes and given a description of the suspect. Later, an Officer Tuttle saw the defendant, noticed his resemblance to the description of the rapist, and detained but did not formally arrest Spikes.<sup>172</sup> The sixteen-year-old defendant agreed to go to the police station where he was fingerprinted.<sup>173</sup> His fingerprints matched the latent prints taken from the cookie jar of the first victim. After the match was made, the defendant was arrested.

On appeal, the defendant argued that the trial court did not have jurisdiction over him because he was not properly arrested under Indiana Code section 31-6-4-4(b).<sup>174</sup> The State stipulated that Officer Tuttle did not have probable cause to arrest Spikes. The supreme court characterized the defendant's initial detention of the defendant as a stop rather than an arrest, and stated that a police officer did not need to have probable cause to arrest in order to make an investigatory stop. "[H]e need only be in possession of facts sufficient to warrant a man of reasonable caution to believe investigation appropriate."<sup>175</sup> The court found that Officer Tuttle had sufficient facts to warrant an investigatory detention. The majority said that fingerprinting during the investigatory stop was neither an unreasonable search and seizure nor a violation of the privilege

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<sup>169</sup>449 N.E.2d at 1089.

<sup>170</sup>*Id.* at 1090.

<sup>171</sup>460 N.E.2d 954 (Ind. 1984).

<sup>172</sup>*Id.* at 955-56.

<sup>173</sup>Additional facts provided in Justice DeBruler's concurring opinion indicate that the defendant's consent to be fingerprinted was less than wholly voluntary: "Appellant testified that he was told that he would not be permitted to leave until he provided his prints. The detective testified that if appellant had attempted to leave at that time he would have been stopped." 460 N.E.2d at 959. (DeBruler, J., concurring).

<sup>174</sup>*Id.* at 956. IND. CODE § 31-6-4-4(b) (1982) provides: "A child may be taken into custody by any law enforcement officer acting with probable cause to believe that the child has committed a delinquent act." *Id.* The defendant argued that the juvenile court lacked jurisdiction to waive him to criminal court and, consequently, that criminal court did not have jurisdiction to enter judgment. *Id.*

<sup>175</sup>460 N.E.2d at 956 (citation omitted).

against self-incrimination.<sup>176</sup> Spikes was not arrested until his fingerprints matched the latent prints, at which point the police had probable cause.

In *Spikes* and *Baker*, the Indiana Supreme Court attempted to describe the circumstances in which a detention, based on less than traditional probable cause and conducted for the sole purpose of obtaining identifying physical evidence, can occur without violating the fourth amendment. The possibility of such a constitutionally permissible detention was suggested by dicta in *Davis v. Mississippi*.<sup>177</sup> In *Baker*, the

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<sup>176</sup>*Id.* The majority cited *Jones v. State*, 267 Ind. 205, 369 N.E.2d 418 (1977), for its statement that "fingerprinting is a jail house procedure which does not violate a defendant's Fifth Amendment right against self-incrimination and does not constitute an unreasonable search and seizure of evidence from the defendant." 460 N.E.2d at 956. *Jones*, however, is of questionable applicability because it involved fingerprinting done after the defendant's arrest. In *Spikes*, the fingerprinting preceded the arrest.

In his separate concurrence, Justice DeBruler analyzed the case in two stages. The first stage, which occurred when Spikes was stopped on the street, was evaluated in light of *Terry v. Ohio*, 392 U.S. 1 (1968), and *Davis v. Mississippi*, 394 U.S. 721 (1969). Justice DeBruler found the investigatory stop proper under *Terry* and unlike the dragnet stop in *Davis*. Because the stop was lawful and because Spikes voluntarily consented to be transported to the police station interrogation room, Justice DeBruler found that there was no constitutional violation at this stage. 460 N.E.2d at 959 (DeBruler, J., concurring). In the second stage of his analysis, Justice DeBruler found that Spikes' detention for fingerprinting was constitutional based on the rule in *United States v. Dionisio*, 410 U.S. 1 (1973). 460 N.E.2d at 960 (DeBruler, J., concurring). *Dionisio*, however, did not address the issue of detentions for procurement of identification evidence. Instead, *Dionisio* involved a grand jury subpoena and an order to provide a voice exemplar. In Justice DeBruler's analysis, the police order for fingerprints in *Spikes* was treated as equivalent to the grand jury order in *Dionisio*. 460 N.E.2d at 960. (DeBruler, J., concurring). There are important differences between those procedures. First, the grand jury subpoena was subject to judicial review. Second, the target witness in *Dionisio* was lawfully present under the subpoena when the order for a voice exemplar was issued. His presence was not the result of a seizure under the fourth amendment. 410 U.S. at 9. In contrast, Spikes' presence at the police station was brought about by a seizure in the fourth amendment sense. Spikes was told he could not leave police custody until he provided his fingerprints, yet there was no probable cause to hold him under traditional probable cause to arrest standards. 460 N.E.2d at 959-60 (DeBruler, J., concurring). Spikes' detention would have been unlawful at that point, unless it could have been justified under a lesser probable cause standard like that recognized in *Baker v. State*, 449 N.E.2d 1085 (Ind. 1983). The rationale suggested by Justice DeBruler would have been more persuasive if the second stage had been based on *Baker*.

<sup>177</sup>394 U.S. 721, 721 (1969). The Court stated: "We have no occasion in this case, however, to determine whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining, during the course of a criminal investigation, the fingerprints of individuals for whom there is no probable cause to arrest." *Id.* at 728. This dictum in *Davis* has generated considerable activity in state courts and legislatures. The leading case in the United States on the issue is *Wise v. Murphy*, 275 A.2d 205 (D.C. 1971), in which the government obtained a lineup order from a judge even though there was insufficient probable cause to arrest. The American Law Institute advocated legislation authorizing the issuance of identification orders for suspects in the

detention for photographing was based on an arrest warrant supported by less than probable cause. In *Spikes*, the detention for fingerprinting was based solely on the direction of an officer at the police station; probable cause did not exist.

It is not clear from the opinion in *Baker* whether the court simply held that there was probable cause to arrest, photograph, and fingerprint Baker, or whether it was applying a more liberal standard for an investigative detention to obtain physical evidence. The court's subsequent decision in *Spikes* did not even mention *Baker*. Nonetheless, in *Spikes* the State stipulated that there was insufficient probable cause to arrest the defendant. This developing area of state law, then, must await later decisions which should fully develop clear guidelines for evaluating detentions for gathering identification evidence.

*b. Plain View Doctrine.*—Two Indiana cases analyzed the plain view doctrine during the survey period. The first, *Manning v. State*,<sup>178</sup> was decided by the third district court of appeals. In *Manning*, a police officer went to a salvage yard to return the defendant's personal property. While he was there, the officer noticed an unlicensed, 1979 maroon Oldsmobile parked on the property. The officer was suspicious that the car was stolen. He shined his flashlight on the vehicle identification number imbedded in the dashboard and recorded the number. Later, the officer checked the identification number by computer and determined that the Oldsmobile had been stolen. He obtained a search warrant to search the salvage yard for the Oldsmobile. During the search, police officers entered a storage shed near where the Oldsmobile had been

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Model Code of Pre-Arrest Procedure. In essence, the Model Code permits a magistrate to issue an order compelling a suspect to provide identification evidence if: (1) there is reasonable cause to believe that an offense has been committed; (2) there are reasonable grounds to suspect that the subject of the order has committed the offense and it is reasonable to subject him to an identification order in view of the seriousness of the offense; (3) the results will be of material aid in determining whether or not the suspect committed the offense; and (4) the evidence cannot be otherwise practicably obtained. MODEL CODE OF PRE-ARREST PROCEDURE § 170.2(6) (1975). "Reasonable grounds" is used by the Model Code to define the standard for a stop, *id.* § 110.2, so it is clear that detentions for obtaining physical evidence were intended to be ordered on less than probable cause. *Id.* § 170.2, note at 102-03.

Where no statutes or court rules have been adopted, some courts have been reluctant to hold that a court may order detention of a suspect to obtain physical evidence on less than probable cause. See, e.g., *People v. Marshall*, 69 Mich. App. 288, 244 N.W.2d 451 (1976); *In re Abe A.*, 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982); *In re Armed Robbery, Albertson's*, 99 Wash. 2d 106, 659 P.2d 1092 (1983). The New Jersey Supreme Court recently held that courts, as an inherent power within their constitutional authority governing searches and seizures, had authority to issue a detention order for identification evidence. See *State v. Hall*, 93 N.J. 552, 461 A.2d 1155 (1983).

<sup>178</sup>*Manning v. State*, 459 N.E.2d 1207 (Ind. Ct. App. 1984), *transfer denied*, June 21, 1984.

seen. The Oldsmobile was not found inside, but police officers checked the license numbers and vehicle identification numbers of the other vehicles in the building, apparently opening the doors and hoods to do so. A computer check revealed that one of these vehicles had been stolen. The search ended and the area was secured. A second search warrant was obtained based upon the information gathered during the first warranted search. This second warrant was generally directed to a search for any stolen vehicles or property. The warrant was executed and various items were seized.<sup>179</sup>

The defendant challenged the introduction of the evidence seized. He argued that the evidence should have been excluded because the scope of the search under the first warrant exceeded that warrant, thereby rendering the second warrant invalid because it was based upon information obtained as a result of an excessive search. The defendant challenged the police's reliance on the plain view doctrine to justify the search of the shed after they learned the Oldsmobile was not there. The plain view doctrine has been explained by the Indiana Supreme Court:

“Pursuant to the doctrine, a police officer rightfully occupying a particular location who inadvertently discovers items of readily apparent criminality may properly seize the items; evidence so seized is both admissible as evidence and usable for derivative purposes, for the seizure is not regarded as the product of a search within the meaning of the Fourth Amendment . . . .”<sup>180</sup>

It was this explanation of the plain view doctrine that the court of appeals applied, with particular emphasis on the “readily apparent criminality” aspect. The search of vehicles in the storage shed, after it was clear that the Oldsmobile named in the warrant was not in the shed, was not considered a plain view search by the majority. The search of the other vehicles was improper because those vehicles had no connection with any crimes known to the police at the time of the search and because it was not readily apparent that the vehicles were stolen. When the officers opened doors and hoods to search for vehicle identification numbers, “the search was extended into places where the maroon Oldsmobile could not have been found.”<sup>181</sup> Consequently, the court of appeals held that the officers executing the warrant exceeded the scope of the warrant when they continued their search of the storage shed.<sup>182</sup> The excessive nature of the search was not justified by the plain view doctrine, particularly because officers had to open car doors and hoods to locate the vehicle identification numbers that formed the basis for the second

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<sup>179</sup>*Id.* at 1209-10.

<sup>180</sup>*Id.* at 1211-12 (quoting *Lance v. State*, 425 N.E.2d 77, 78 (Ind. 1981) (citations omitted)).

<sup>181</sup>459 N.E.2d at 1212.

<sup>182</sup>*Id.*

search. The majority and dissent sharply disagreed on whether it was readily apparent that the other vehicles in the storage shed might have been evidence of a crime, and thus within the plain view doctrine. According to the dissent, when the officers were executing the warrant, it was obvious that they had come upon an illegal "chop shop."<sup>183</sup> If it were readily apparent that a chop shop operation was uncovered in *Manning*, then the officers should have had the authority to seize the vehicles as evidence of a crime. The dissent also stated that no illegal search occurred when the police recorded vehicle identification and license numbers because those identifying characteristics "are in plain view on all autos for the purpose of aiding identification."<sup>184</sup> The dissent ignored the majority's observation that the police opened doors and hoods to obtain the vehicle identification numbers.

The different statements of facts presented by the majority and dissent are crucial in explaining their different outcomes. If, as the dissent asserted, the police officers only observed vehicle identification numbers on a dashboard through the windshield or wrote down license numbers, such activity should be upheld under the plain view doctrine. If, as the majority stated, the police officers opened car doors and hoods to search for identification numbers, the plain view doctrine was inapplicable and the admissibility of the results must be justified on a different theory. It could be argued that such a search should be upheld because there is no expectation of privacy in a vehicle identification number,<sup>185</sup> or that police should be permitted to search for the identification number under a lesser standard than probable cause, such as reasonable suspicion.<sup>186</sup> The facts in *Manning* indicated that the police officers could have met this lesser standard. Nevertheless, as written, the majority did not satisfactorily explain why dashboard-imbedded vehicle identification numbers or license plate numbers were illegally seized by the police. It implied that the officers should not have examined

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<sup>183</sup>*Id.* at 1214 (Hoffman, J., concurring in part and dissenting in part). The dissent's description of the facts differed significantly from that of the majority: "Once inside [the shed], they [police officers] observed late model automobiles in various degrees of dismantlement. Cutting torches had been used to 'chop' cars that appeared too new and undamaged to be in a salvage yard. The locks on several vehicles had been punched out, and steering columns were mysteriously dismantled." *Id.*

<sup>184</sup>*Id.* at 1215.

<sup>185</sup>See W. LAFAVE, *Search and Seizure* § 2.5(d) (1978) (citing *United States v. Polk*, 433 F.2d 644 (5th Cir. 1970)). If there is a lesser expectation of privacy in vehicle identification numbers, that limited expectation would be further lessened in an auto salvage yard. See *Bionic Auto Parts & Sales, Inc. v. Fahner*, 721 F.2d 1072 (7th Cir. 1983) (upheld administrative inspection warrants for the search of auto salvage yards). See also IND. CODE § 9-1-3.6-14 (Supp. 1984).

<sup>186</sup>See 1 W. LAFAVE, *supra* note 185, at § 2.5(d) (citing *United States v. Powers*, 439 F.2d 373 (4th Cir. 1971); *State v. Colon*, 6 Conn. Cir. Ct. 722, 316 A.2d 797 (1973); *Commonwealth v. Navarro*, 2 Mass. App. Dec. 214, 310 N.E.2d 372 (1974)).

what was in plain view before them once the particular car sought was not found.

The plain view doctrine was also the focus of the Indiana Supreme Court in *McReynolds v. State*.<sup>187</sup> In this case, police obtained a warrant to search the defendant's home. The only item listed in the warrant was the sawed-off barrel of a double-barrel shotgun that had been used to kill two persons and injure three others. In the course of his search, a police officer looked inside a cabinet large enough to conceal the gun barrel. Inside the cabinet, the officer discovered marijuana seeds in a clear plastic bag and seized the marijuana. The defendant argued that the marijuana was improperly discovered and should have been suppressed.<sup>188</sup>

There are three basic requirements for a search and seizure based on the plain view doctrine: (1) the officer must first make a lawful intrusion or lawfully be in a place where he can observe the evidence; (2) the officer must discover the evidence inadvertently; and (3) it must be immediately apparent that the items the officer observes are evidence of a crime, contraband, or otherwise subject to seizure.<sup>189</sup> In *McReynolds*, the first requirement was met because the officers were on the premises pursuant to a valid search warrant. The officer who looked in the cabinet was properly doing so since it was in a place where the shotgun barrel might have been hidden. Second, the discovery of the marijuana was inadvertent because the police did not know in advance that the marijuana was there.

In determining whether or not the third requirement had been satisfied, the court discussed whether the evidence inadvertently discovered in plain view must be connected in some way to the crime which gave rise to the initial intrusion.<sup>190</sup> If this were true, the marijuana would be suppressed because it was not related to the murders or the shotgun. The Indiana Supreme Court refused to place such a restriction on the plain view doctrine, and instead stated that the item seized need only be evidence of *a* crime, not evidence of *the* crime which gave rise to the search.<sup>191</sup> In this case, the officer testified at the suppression hearing that he knew the item was marijuana. Because the evidentiary value of the item seized was immediately apparent, the third requirement of the plain view doctrine was met. After *McReynolds*, it is clear that police need not ignore evidence of criminal activity that is in plain view simply because it is unrelated to the crime that gave rise to the police investigation.

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<sup>187</sup>460 N.E.2d 960 (Ind. 1984).

<sup>188</sup>*Id.* at 962.

<sup>189</sup>*Id.* (citing *Texas v. Brown*, 103 S. Ct. 1535, 1540 (1983)).

<sup>190</sup>460 N.E.2d at 963.

<sup>191</sup>*Id.*

*c. Probable Cause Affidavits.*—The Indiana Supreme Court explained the use of probable cause affidavits in *Baker v. State*.<sup>192</sup> In that case, the defendant claimed an arrest warrant was defective because it was based on a probable cause affidavit that did not expressly state that the witnesses quoted therein spoke with personal knowledge and because the affidavit was not incorporated into the warrant.

First, the supreme court held that the failure to incorporate the affidavit into the warrant was not a fatal defect when the warrant alone was sufficiently specific as to its object and scope.<sup>193</sup> By statute, the form of the warrant requires a description of the place to be searched and the property that is the subject of the search.<sup>194</sup> Because there was no lack of specificity and no prohibited discretion vested in the police, the court concluded that the warrant was not totally defective.<sup>195</sup>

Second, the supreme court stated that because the probable cause affidavit was sufficient to support the warrant, it was reasonable to assume that the witnesses quoted therein were speaking about facts within their knowledge. The court said the defendant mistakenly relied on *Madden v. State*,<sup>196</sup> a decision based on a search warrant statute that had been amended twice since that case. After *Baker*, it appears that *Madden* has finally been laid to rest.

During the survey period, the Indiana General Assembly again amended the arrest and search warrant statute to expand the potential bases for a finding of probable cause.<sup>197</sup> Previously, the law required that when probable cause is based on hearsay, the supporting affidavit must “contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished.”<sup>198</sup> After the 1984 amendments, the law provides:

When based on hearsay, the affidavit must either:

(1) contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished; or

(2) contain information that establishes that the totality of the circumstances corroborates the hearsay.<sup>199</sup>

<sup>192</sup>449 N.E.2d 1085 (Ind. 1983). See *supra* text accompanying notes 165-69.

<sup>193</sup>449 N.E.2d at 1090.

<sup>194</sup>IND. CODE § 35-33-5-3 (1982).

<sup>195</sup>449 N.E.2d at 1090.

<sup>196</sup>263 Ind. 223, 328 N.E.2d 727 (1975).

<sup>197</sup>Act of Feb. 24, 1984, Pub. L. No. 177-1984, 1984 Ind. Acts 1478 (codified at IND. CODE § 35-33-5-2 (Supp. 1984)).

<sup>198</sup>IND. CODE § 35-33-5-2 (1982).

<sup>199</sup>IND. CODE § 35-33-5-2 (Supp. 1984).

Previously, the Indiana law codified the *Aguilar-Spinelli* two-pronged approach to demonstrating probable cause.<sup>200</sup> The *Aguilar-Spinelli* test was significantly modified by the United States Supreme Court in *Illinois v. Gates*.<sup>201</sup> The new Indiana law reflects this modification. It presents alternative approaches to demonstrating probable cause when based on hearsay. The first is still the *Aguilar-Spinelli* test, and the second is the totality of the circumstances approach of *Gates*.

2. *Pretrial Issues.—a. Grand Juries.*—Under Indiana grand jury procedure, a target witness has the right to an attorney, including an appointed attorney.<sup>202</sup> Before this year, however, there had been no statutory or recognized constitutional right<sup>203</sup> to have counsel present with the witness in the grand jury room. The common practice has been for counsel to remain outside the grand jury room to consult with the witness if the witness has a question. This year the General Assembly amended the grand jury statutes to provide that a target witness may be assisted by an attorney in the grand jury room.<sup>204</sup> The new statute provides:

(a) A target subpoenaed under section 5[35-34-2-5] of this chapter is entitled to the assistance of his attorney when the person is questioned in the grand jury room, subject to this section.

(b) The target's attorney:

(1) must take an oath of secrecy administered by the foreman;

(2) while in the grand jury room may not, without first obtaining the consent of the prosecutor and the foreman:

(A) address the grand jury or the prosecuting attorney;

(B) make objections or arguments;

(C) question any person; or

(D) otherwise participate in the proceedings; and

(3) may advise the client so long as the conversation is not overheard by any member of the grand jury.

(c) The court that impaneled the grand jury may remove any attorney from the grand jury room and may find him to be in contempt of court if the attorney has violated the requirements of subsection (b) or has otherwise disrupted or unnecessarily delayed the grand jury proceeding.<sup>205</sup>

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<sup>200</sup>The two-pronged test takes its name from *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U.S. 108 (1964).

<sup>201</sup>103 S. Ct. 2317 (1983), *reh'g denied*, 104 S. Ct. 33 (1983).

<sup>202</sup>IND. CODE § 35-34-2-5 (1982).

<sup>203</sup>*United States v. Mandujano*, 425 U.S. 564 (1976).

<sup>204</sup>Act of Mar. 8, 1984, Pub. L. No. 170-1984, § 3, 1984 Ind. Acts 1391 (codified at IND. CODE § 35-34-2-5.5 (Supp. 1984)).

<sup>205</sup>IND. CODE § 35-34-2-5.5 (Supp. 1984).

Prosecutors operating under the new statute have reported that attorneys for target witnesses have been actively involved in the proceedings. If the attorney for the witness asks permission to ask questions, the grand jury foreman will usually agree and the prosecuting attorney often will not want to disagree with the foreman.<sup>206</sup> Therefore, as a practical matter, the attorney for a target witness may have a significant role in grand jury proceedings.

The Indiana Supreme Court also had an occasion to rule on the constitutionality of the grand jury witness immunity statutes. In *In re Caito*,<sup>207</sup> the defendant was subpoenaed before a grand jury as a target witness. Upon his attorney's advice, Caito refused to testify after being sworn, except to identify himself. He claimed his answers might tend to incriminate him. The State moved to grant Caito use immunity under Indiana Code section 35-34-2-8,<sup>208</sup> and requested that he answer a list of written questions. The court granted use and derivative use immunity and ordered Caito to answer questions. When he again asserted his privilege against self-incrimination, Caito was found in contempt.<sup>209</sup>

The defendant challenged the constitutionality of the witness immunity statutes as applied to target witnesses. The court said the immunity statute would be upheld as constitutional if it were found to be coextensive with the privilege against self-incrimination.<sup>210</sup> The court reviewed the various forms of immunity:

Three types of immunity may be granted a witness in exchange for his testimony: (1) *transactional immunity*: which prohibits the State from criminally prosecuting the witness for any transaction concerning that to which the witness testifies; (2) *use immunity*: where the testimony compelled of the witness may not be used at a subsequent criminal proceeding; and (3) *derivative use immunity*: whereby any evidence obtained as a result of the witness' compelled testimony may not be admitted against him in a subsequent criminal prosecution.<sup>211</sup>

The court explained that transactional immunity is constitutional because the witness granted it receives the same protection as if he had never testified. Contrarily, use immunity alone is not coextensive with fifth amendment protections because the compelled testimony may still be employed by investigators to obtain other incriminating evidence. The Indiana statute combines use and derivative use immunity, and as such

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<sup>206</sup>This scenario is derived from the author's conversations with Indiana prosecuting attorneys since the statute became effective.

<sup>207</sup>459 N.E.2d 1179 (Ind. 1984).

<sup>208</sup>IND. CODE § 35-34-2-8 (1982).

<sup>209</sup>459 N.E.2d at 1181.

<sup>210</sup>*Id.* at 1182 (citing *Kastigar v. United States*, 406 U.S. 441 (1972)).

<sup>211</sup>459 N.E.2d at 1182-83 (citations omitted).

provides immunity that is coextensive to the privilege against self incrimination, according to the Indiana Supreme Court.<sup>212</sup>

*b. Change of Judge.*—In 1984, the Indiana legislature attempted to reinstate the right to an automatic change of judge.<sup>213</sup> Activity on the part of the Indiana Supreme Court, however, indicates that the legislature's attempt has failed. In *State ex rel. Gaston v. Gibson Circuit Court*,<sup>214</sup> the supreme court found that a previous legislative effort to restore the right to an automatic change of judge was in conflict with Criminal Rule 12.<sup>215</sup> Because the statute was construed to be procedural in nature and in conflict with Criminal Rule 12, the court held that Criminal Rule 12 controlled and the statute was declared a nullity.<sup>216</sup>

Shortly after *Gaston*, an original action challenging the 1984 version of the change of judge statute came before the supreme court in *State ex rel. Jeffries v. Lawrence Circuit Court*.<sup>217</sup> The court, following *Gaston*, once again found the legislative enactment in conflict with Criminal Rule 12 and held that Criminal Rule 12 controlled changes of judge. There remains no right to an automatic change of judge.

Another decision concerning changes of judge was decided by the court of appeals in *Hobbs v. State*.<sup>218</sup> In that case the defendant contended that he was denied a fair trial because the prosecutor always has the right to a change of judge by virtue of his authority to select the court

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<sup>212</sup>*Id.* at 1184. The court quoted the United States Supreme Court in *Kastigar v. United States*, 406 U.S. 441, 460 (1972), which suggested that to protect against prosecutorial abuses, the State should have the burden of showing that subsequent evidence introduced is not tainted by the immunity. The State can avoid the taint by establishing that the evidence has an independent, legitimate source. The prosecution's duty to prove that the evidence it proposes is derived from a legitimate source is an affirmative duty. 459 N.E.2d at 1184.

<sup>213</sup>Act of Mar. 8, 1984, Pub. L. No. 170-1984, § 4, 1984 Ind. Acts 1392 (codified at IND. CODE § 35-36-5-1 (Supp. 1984)). The statute provides:

In any criminal action, either the defendant or the state is entitled as a substantive right to a preemptory change of venue from the judge without specifically stating the reason. The defendant or the state may obtain a change of judge under this section by motion filed in a manner and within the time limitations as specified in the Indiana Rules of Criminal Procedure. Each party is entitled to only one (1) change of judge under this section.

IND. CODE § 35-36-5-1 (Supp. 1984).

<sup>214</sup>462 N.E.2d 1049 (1984).

<sup>215</sup>*Id.* at 1050-51. The statute at issue provided: "In any criminal action, either the state or the defendant is entitled as a substantive right to a change of venue from the judge upon the same grounds and in the same manner as a change of venue from the judge is allowed in civil actions." IND. CODE § 35-36-6-1(c) (Burns Supp. 1983) (repealed 1984).

<sup>216</sup>462 N.E.2d at 1051.

<sup>217</sup>*State ex. rel. Jeffries v. Lawrence Circuit Court*, 467 N.E.2d 741 (Ind. 1984).

<sup>218</sup>451 N.E.2d 356 (Ind. Ct. App. 1983).

in which to file charges. He argued that due process required courts with criminal jurisdiction to assign cases on a "blind draw" method rather than permitting the prosecutor to file charges in the court of his choice. The court of appeals refused to hold that such a filing system was constitutionally required.<sup>219</sup>

3. *Guilty Pleas and Post-Conviction Relief.—a. Statutory Changes.—*

A number of developments occurred in the area of guilty pleas, particularly the legislature's amendments to the guilty plea statutes. The guilty plea advisement statute was amended to provide:

(a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first *determining that* the defendant:

(1) understands the nature of the charge against him;

(2) *has been informed* that by his plea he waives his rights to:

(A) a public and speedy trial by jury;

(B) confront and cross-examine the witnesses against him;

(C) have compulsory process for obtaining witnesses in his favor; and

(D) require the state to prove his guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against himself;

(3) *has been informed* 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; and

(4) *has been informed that if:*

(A) *there is a plea agreement as defined by section 1 of this chapter; and*

(B) *the court accepts the plea;*

the court is bound by the terms of the plea agreement.

(b) A defendant in a misdemeanor case may waive the rights under subsection (a) by signing a written waiver.

(c) *Any variance from the requirements of this section that does not violate a constitutional right of the defendant is not a basis for setting aside a plea of guilty.*<sup>220</sup>

Two important changes are contained in this statute. Under the prior statute, a judge accepting a plea could not accept the plea without first "addressing" the defendant and "informing him" of those certain specified rights the defendant waived by entering a plea of guilty and the

<sup>219</sup>*Id.* at 359-60.

<sup>220</sup>Act of Feb. 29, 1984, Pub. L. No. 179-1984, §1, 1984 Ind. Acts 1486, (cc'dified at IND. CODE § 35-35-1-2 (Supp. 1984)) (additions to statutory language appear in italics).

potential range of sentences he might receive.<sup>221</sup> Based on the previous statute, the Indiana Supreme Court held that trial judges must personally inform defendants of all these facts and that the advisement could come from no other source.<sup>222</sup> Generally, the focus was not on whether or not the defendant understood the rights he was waiving but on whether the judge advised him of those rights. The new law no longer requires that the judge personally advise the defendant, only that the judge not accept a guilty plea without first "determining that" the defendant "has been informed" of the constitutional rights he is waiving and the consequences of his plea.<sup>223</sup> Under this new statute, it is possible that a written advisement of rights in a felony case entered in the record at a guilty plea proceeding may suffice as an advisement to the defendant.

Another significant provision added by the statute is a harmless error clause.<sup>224</sup> Under this clause, any variance from the statutorily required advisements which does not violate the defendant's constitutional rights is not a basis for setting aside a guilty plea. This concept was derived from a recent amendment to the Federal Rules of Criminal Procedure.<sup>225</sup> Recent decisions of the Indiana courts, however, have declared this subsection to be a nullity since the failure of a judge to inform an accused of facts necessary for him to make a voluntary and informed judgment whether or not to plead guilty cannot be considered harmless error.<sup>226</sup> Additionally, the Indiana Supreme Court has ruled that the harmless error section violates the constitutional doctrine of separation of powers.<sup>227</sup>

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<sup>221</sup>IND. CODE § 35-325-1-2 (1982).

<sup>222</sup>Early v. States, 442 N.E.2d 1071 (Ind. 1982); German v. State, 428 N.E.2d 234 (Ind. 1981). See also Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 152 (1984).

<sup>223</sup>IND. CODE § 35-35-1-3 was similarly amended: "(a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the plea is voluntary. The court shall determine whether any promises, force, or threats were used to obtain the plea." IND. CODE § 35-35-1-3(a) (Supp. 1984).

<sup>224</sup>IND. CODE § 35-35-1-2(c) (Supp. 1984).

<sup>225</sup>Under the federal rules, the harmless error provision contained in the rule governing pleas states: "Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 11(h).

<sup>226</sup>Austin v. State, 468 N.E.2d 1027 (Ind. 1984); Jones v. State, 467 N.E.2d 757 (Ind. Ct. App. 1984).

<sup>227</sup>Austin v. State, 468 N.E.2d 1027 (Ind. 1984). The court explained, "Under the separation of powers doctrine of our state constitution, the legislature may not fetter the judiciary with its concept of harmless error." *Id.* at 1029. Interestingly, the legislature's concept of harmless error codified at IND. CODE § 35-35-1-2(c) is not inconsistent with the court's own general harmless error rule. The court's harmless error rule, however, encompasses "substantial rights," clearly broader than the constitutional rights contemplated by the legislature. See IND. R. TR. P. 61 (made applicable to criminal cases by IND. R. CRIM. P. 21).

The Indiana General Assembly also enacted a statute governing the imposition of penalties following a grant of post-conviction relief.<sup>228</sup> Indiana Code section 35-50-2-1 provides:

If:

(1) prosecution is initiated against a petitioner who has successfully sought relief under any proceeding for postconviction remedy and a conviction is subsequently obtained; or

(2) a sentence has been set aside under a postconviction remedy and the successful petitioner is to be resentenced;

the sentencing court may impose a more severe penalty than that originally imposed, and the court shall give credit for time served.<sup>229</sup>

This statute appears to be no more than a codification of the federal constitutional rules developed in *North Carolina v. Pearce*<sup>230</sup> and *Chaffin v. Stynchcombe*.<sup>231</sup> As a matter of state law, however, a problem exists because this new statute is in conflict with the Indiana Supreme Court's rules for post-conviction remedies. Post-Conviction Rule 1, section 10 states:

(a) If prosecution is initiated against a petitioner who has successfully sought relief under this Rule and a conviction is subsequently obtained, or

(b) if a sentence has been set aside pursuant to this Rule and the successful petitioner is to be resentenced, then the sentencing court shall not impose a more severe penalty than that originally imposed, and the court shall give credit for time served.<sup>232</sup>

The supreme court has applied this rule to prohibit a court from imposing a higher sentence on a defendant than he originally received on his guilty plea if his guilty plea is vacated as a result of post-conviction relief.<sup>233</sup> Therefore, at least as to guilty pleas vacated through post-conviction relief, there appears to be a conflict between the new statute and the supreme court's post-conviction relief rules. Where there is a direct conflict between a supreme court rule and a legislative enactment, one must determine whether the statute is procedural or substantive. If it

<sup>228</sup>Act of Feb. 29, 1984, Pub. L. No. 179-1984, § 3, 1984 Ind. Acts 1487 (codified at IND. CODE § 35-50-1-5 (Supp. 1984)).

<sup>229</sup>IND. CODE § 35-50-1-5 (Supp. 1984).

<sup>230</sup>395 U.S. 711 (1969). *Pearce* would limit the statute to higher sentences based upon objective information concerning conduct by the defendant which became known to the judge after the original sentencing hearing. *Id.* at 726.

<sup>231</sup>412 U.S. 17 (1973).

<sup>232</sup>IND. R. POST-CONVICT. REM. § 10.

<sup>233</sup>*Ballard v. State*, 262 Ind. 482, 318 N.E.2d 798 (1974).

is procedural, the supreme court rule will control over the statute.<sup>234</sup> The supreme court undoubtedly will be called upon to resolve this apparent conflict between the new enactment and the post-conviction rules.

One question presented to trial courts shortly after the new statutes became effective was whether or not the statutes could be applied retroactively to guilty pleas entered before the effective date.<sup>235</sup> The obvious thrust of the statute was directed not only at guilty pleas entered after the effective date, but also at appellate review of guilty pleas entered before that date. Nonetheless, recent decisions have refused to give the statutes retroactive application.<sup>236</sup>

*b. Alford Pleas.*—During the survey period, the Indiana Supreme Court explained Indiana law regarding *Alford* pleas, those guilty pleas entered while the defendant simultaneously maintains his innocence.<sup>237</sup> The state supreme court appeared to adopt the *Alford* rule wholeheartedly in *Boles v. State*.<sup>238</sup> Yet in *Ross v. State*,<sup>239</sup> the supreme court declared: “We hold, as a matter of law, that a judge may not accept a plea of guilty when the defendant both pleads guilty and maintains his innocence at the same time. To accept such a plea constitutes reversible error.”<sup>240</sup> *Ross* did not present a classic *Alford* plea issue, however, because the defendant did not originally enter a guilty plea. He was tried and convicted of armed robbery, rape, and of being a habitual criminal. At trial, the State offered the defendant a plea bargain agreement in open court and in the presence of his counsel. The plea agreement was rejected by the defendant’s counsel; the defendant registered no complaint with the result. After his conviction, the defendant filed a petition for post-conviction relief, alleging ineffective assistance of counsel. *Ross* contended that only he and not his lawyer could have accepted or rejected the plea agreement, and that his lawyer failed to satisfy the defendant’s desire to accept the agreement while maintaining his innocence.<sup>241</sup>

The Indiana Supreme Court rejected both of the defendant’s contentions, and explained that *Alford* and *Boles* were not on point. The

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<sup>234</sup>State ex rel. Gaston v. Gibson Circuit Court, 462 N.E.2d 1049 (Ind. 1984); State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972).

<sup>235</sup>IND. CODE § 35-35-1-2 (Supp. 1984) (effective Feb. 29, 1984); IND. CODE § 35-50-1-5 (Supp. 1984) (effective Feb. 29, 1984).

<sup>236</sup>Austin v. State, 468 N.E.2d 1027 (Ind. 1984); Davis v. State, 464 N.E.2d 926 (Ind. Ct. App. 1984).

<sup>237</sup>The name of the plea is derived from North Carolina v. Alford, 400 U.S. 25 (1970), in which the Supreme Court held that it was not an error to accept a guilty plea from a defendant who simultaneously maintained his innocence when there was a strong factual showing that the defendant committed the crime.

<sup>238</sup>261 Ind. 354, 303 N.E.2d 645 (1973).

<sup>239</sup>456 N.E.2d 420 (Ind. 1983).

<sup>240</sup>*Id.* at 423.

<sup>241</sup>*Id.* at 421.

court used *Ross* as an opportunity to clarify Indiana law on the acceptance of guilty pleas. First, the court observed that *Boles* did not involve a guilty plea entered over protestations of innocence, so the *Boles* court's reliance on *Alford* was only dictum. Second, the court noted that *Alford* did not create a mandatory requirement for a court to accept a guilty plea under *Alford*-like circumstances.<sup>242</sup> Third, the court held that, as a matter of law, in Indiana, a judge may not accept a guilty plea accompanied by a defendant's claim of innocence.<sup>243</sup>

Unfortunately, the supreme court's holding raises more unanswered questions. This confusion could be attributed to the fact that the court reached to answer a question not squarely before it. Because the defendant did not actually enter a guilty plea, the State had no occasion to establish a "factual basis" to demonstrate that the defendant committed the crime. *Ross* did not answer whether or not the judge can accept a guilty plea accompanied by the defendant's protestations of innocence if the State establishes by overwhelming evidence that the defendant committed the crime. In his concurring opinion, Justice DeBruler attempted to limit the holding to the entry of guilty pleas when the defendant claims his innocence "unaccompanied by evidence showing a factual basis for guilt."<sup>244</sup> *Ross* also failed to explain what constitutes a "protestation of innocence." It is unclear, for example, whether a defendant who simply states he was too drunk at the time of the crime to remember whether he committed it has registered a protest of innocence. It is also unclear whether the trial court can, nonetheless, accept his guilty plea if the State establishes a factual basis for the plea. Courts that have considered this issue have held that the plea can be accepted.<sup>245</sup> A related question is presented by the defendant who claims he acted in self-defense and yet pleads guilty to a lesser offense: Can the judge still accept the plea? The Indiana Court of Appeals has held that the court could accept the plea where the defendant admitted the crime and related its material facts.<sup>246</sup>

In summary, *Ross* is consistent with past Indiana cases and the United States Supreme Court's decision in *Alford* if it held that a trial judge has no discretion to accept a guilty plea when the defendant protests his innocence and there has been no factual basis established to demonstrate that the defendant committed the crime. But if *Ross*

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<sup>242</sup>*Id.* at 423.

<sup>243</sup>*Id.*

<sup>244</sup>*Id.* at 425 (DeBruler, J., concurring). Justice DeBruler suggested that trial courts follow the statutory scheme found at IND. CODE § 35-35-1-3(b) (1982). 456 N.E.2d at 425 (DeBruler, J., concurring).

<sup>245</sup>*Anderson v. State*, 396 N.E.2d 960, (Ind. Ct. App. 1979); *Pearson v. State*, 308 Minn. 287, 241 N.W.2d 490 (1976).

<sup>246</sup>*Brown v. State*, 421 N.E.2d 431 (Ind. Ct. App. 1981).

held that a guilty plea can never be accepted when the defendant claims his innocence, even when there is a factual basis for the plea, it is a marked departure from precedent.<sup>247</sup>

*c. Advising the Defendant.—1. Public and Speedy Jury Trial.*—Indiana courts have generally been very strict in requiring that the record of a guilty plea reflect that the judge personally advised the defendant of the rights he was waiving by entry of the plea.<sup>248</sup> Nevertheless, the judge is not required to advise the defendant of those rights in any prescribed words or particular litany.<sup>249</sup> Several decisions during the survey period approved of a judge's advice to a defendant concerning his waiver of public and speedy trial rights even though the advice given in several cases was an imperfect explanation of the defendant's rights.

The leading case in the area was *Garringer v. State*,<sup>250</sup> in which the trial judge carefully explained to the defendant the rights he was waiving without mentioning the words "public" and "speedy" when discussing the right to a jury trial. The court explained that the right to a jury trial meant that twelve people of the county would determine the defendant's guilt or innocence. The court also explained that other people would be present during the trial, including witnesses who could be called to testify. The Indiana Supreme Court held that the judge's explanation of a jury trial was sufficient to advise the defendant that his trial was public. The supreme court also held that the omission of the word "speedy" was not grounds to vacate the plea because the defendant "clearly knew how speedy his trial was to be since he acknowledged at the hearing that he knew it was set to begin two days later."<sup>251</sup>

There is a subtle but critical distinction between these two holdings by the supreme court. Regarding advice as to a public trial, the court focused on what the judge told the defendant. There can be few complaints with the judge's advice on this point. Regarding the speedy trial advisement, however, the court focused on what the defendant actually knew about his speedy trial rights and not on the advice of the judge. Therefore, at least as to the advisement of speedy trial rights, the supreme

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<sup>247</sup>See *Neeley v. State*, 457 N.E.2d 532 (Ind. 1983); *Johnson v. State*, 457 N.E.2d 196 (Ind. 1983); *Lowe v. State*, 455 N.E.2d 1126 (Ind. 1983) (cases describing what constitutes a sufficient basis on which to accept a guilty plea).

<sup>248</sup>See *Early v. State*, 442 N.E.2d 1071 (Ind. 1982); *German v. State*, 428 N.E.2d 234 (Ind. 1981). See also *Johnson, Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 152 (1984).

<sup>249</sup>*McCann v. State*, 446 N.E.2d 1293 (Ind. 1983); *Laird v. State*, 270 Ind. 323, 385 N.E.2d 452 (1979).

<sup>250</sup>455 N.E.2d 335 (Ind. 1983).

<sup>251</sup>*Id.* at 339.

court indicated its willingness to look beyond the words uttered by the advising judge to determine whether or not the defendant was sufficiently cognizant of his right.<sup>252</sup>

In *Lowe v. State*,<sup>253</sup> the supreme court again found that an accused was adequately advised of his right to a "public" trial. In *Lowe* the judge explained the defendant's right to a trial by jury with twelve of his peers, his right to subpoena witnesses in his behalf, and his right to cross-examine those witnesses against him.<sup>254</sup>

The Indiana Court of Appeals soon began to follow *Garringer*. In *Seybold v. State*,<sup>255</sup> the advising judge did not utter the words "public" and "speedy." Relying on *Garringer*, the appellate court found the advice as to a public trial sufficient when the defendant was advised of his right to present his own witnesses and to cross-examine those against him. The trial judge's reference to a trial date that was only three weeks away was held sufficient to advise the defendant of his right to a speedy trial.<sup>256</sup> The court of appeals also affirmed a guilty plea in *Gresham v. State*,<sup>257</sup> in which the trial court did not specifically advise the defendant of his speedy trial rights. The defendant asked twice for a speedy trial, had it granted each time, and pleaded guilty only four days before his trial date. Additionally, the trial court advised the defendant of the nature and composition of the jury and of his right to call and cross-examine witnesses. The court of appeals held that this was sufficient to advise the defendant of his right to a "public" trial.<sup>258</sup>

2. *Proof Beyond A Reasonable Doubt.*—The latitude permitted in advising a defendant of his public and speedy trial rights is sharply contrasted by the strict requirements of advising a defendant of his waiver of the right to have the State prove his guilt beyond a reasonable doubt. Two Indiana Court of Appeals decisions illustrate the contrast. In *Beahan v. State*,<sup>259</sup> the trial court failed to specifically advise the defendant, at the time she entered her plea, of her right to have the State prove her guilt beyond a reasonable doubt. The defendant had been present throughout voir dire and preliminary instructions when the State's burden of proof was explained to the jury. Nonetheless, because

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<sup>252</sup>See also *Johnson v. State*, 457 N.E.2d 196 (Ind. 1983); *Mathis v. State*, 273 Ind. 609, 406 N.E.2d 1182 (1980).

<sup>253</sup>455 N.E.2d 1126 (Ind. 1983).

<sup>254</sup>*Id.* at 1130.

<sup>255</sup>456 N.E.2d 1076 (Ind. Ct. App. 1983).

<sup>256</sup>*Id.* at 1079.

<sup>257</sup>459 N.E.2d 66 (Ind. Ct. App. 1984).

<sup>258</sup>*Id.* at 68.

<sup>259</sup>449 N.E.2d 1183 (Ind. Ct. App. 1983).

the trial court did not directly advise the defendant of this right, the guilty plea was vacated by the court of appeals.<sup>260</sup> In a concurring opinion, Judge Hoffman acknowledged that the holding was a correct application of Indiana precedent, but added that the guilty plea statute went beyond state or federal constitutional requirements and emphasized that the Indiana Supreme Court required strict compliance with its terms.<sup>261</sup> He concluded that "the next session of the Indiana General Assembly should look at this statute."<sup>262</sup>

The appellate court was confronted again with the issue in *Joshua v. State*.<sup>263</sup> The defendant, Joshua, and his codefendant were to be tried jointly. A jury was impaneled and preliminary instructions were read in Joshua's presence. The State's burden of proof, the presumption of innocence, and the meaning of reasonable doubt were explained to the jury. The day after the trial began, the defendants entered guilty pleas. Joshua observed his codefendant enter a guilty plea after the trial court carefully advised the codefendant that the State had to prove his guilt beyond a reasonable doubt. When Joshua's turn came to enter his plea, the judge failed to advise him of the reasonable doubt standard. The court of appeals reluctantly reversed the conviction and criticized "present case law [that] requires the ritualistic invocation of these rights *at the time the plea is entered* . . . ." <sup>264</sup>

3. *That the Court Is Not Bound By Plea Agreements.*—A multitude of post-conviction relief petitions are filed each year challenging the sufficiency of advisements by trial courts. One might inquire why lower court judges do not simply devise a checklist of required advisements and strictly follow them. This suggestion has much to recommend it, but the difficulty in developing an adequate checklist is easily underestimated. *Early v. State*<sup>265</sup> illustrates the confusion inherent in advisements. The defendant entered his guilty plea on May 4, 1979. The guilty plea advisement statute in effect at that time required the judge to inform a defendant "that the court is not a party to any agreement which may have been made between the prosecutor and the defense and is not bound thereby."<sup>266</sup> At the same time, Indiana law provided that if a court accepted a guilty plea recommendation, the court was bound by

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<sup>260</sup>*Id.* at 1184.

<sup>261</sup>*Id.* (Hoffman, J., concurring) (citing *German v. State*, 428 N.E.2d 234 (Ind. 1981)).

<sup>262</sup>449 N.E.2d at 1184.

<sup>263</sup>452 N.E.2d 463 (Ind. Ct. App. 1983), *transfer denied*, Dec. 19, 1983.

<sup>264</sup>*Id.* at 465.

<sup>265</sup>454 N.E.2d 416 (Ind. 1983).

<sup>266</sup>IND. CODE § 35-4.1-1-3(e) (1976) (repealed 1982). For provisions effective after Sept. 1, 1982, see IND. CODE § 35-35-1-2 (1982).

the terms of that recommendation.<sup>267</sup> Therefore, when the defendant's guilty plea was entered, Indiana had two statutes in apparent conflict.<sup>268</sup> In view of the plea agreement statute, it might appear to some trial judges that it would be wrong to tell a defendant that the court was not bound by the terms of the plea agreement. Yet in *Early*, the trial judge who accepted the plea agreement and sentenced the defendant according to its terms was reversed because he did not advise the defendant that the court was not bound by the terms of the plea agreement.<sup>269</sup>

In a subsequent decision, *Carr v. State*,<sup>270</sup> the judge said to the defendant, "“You understand that if you enter a plea of guilty that it will be my duty to impose a sentence and pursuant to the agreement I would impose a sentence of twenty years, you understand that?””<sup>271</sup> After the defendant said he understood, the judge accepted the plea and sentenced the defendant to twenty years imprisonment. The trial judge stated to the defendant the fact that the judge would follow the plea agreement and sentence the defendant according to the plea agreement. Once again, the Indiana Supreme Court vacated the guilty plea because the judge did not inform the defendant that the court was not bound by the plea agreement. The results in these cases reveal precisely why the legislature amended the guilty plea statutes.

*d. Laches.*—As one might surmise, post-conviction petitions challenging guilty pleas have become a strong source of irritation for judges and prosecuting attorneys. This irritation is exacerbated when a defendant who received the benefit of his plea bargain years ago decides today that he was not properly advised of all his rights and files a post-conviction petition challenging his guilty plea. Quite often, it is the possibility of an habitual offender charge that stirs the defendant to action. In recent years, prosecutors have been combatting these post-conviction petitions by asserting the equitable doctrine of laches. Recent decisions of the appellate courts, however, will hamper this use of the doctrine.

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<sup>267</sup>IND. CODE § 35-5-6-2(b) (1976) (recodified at IND. CODE § 35-35-3-3 (1982)). The binding effect of a plea agreement was firmly established by the supreme court in *State ex rel. Goldsmith v. Marion County Superior Court*, 419 N.E.2d 109 (Ind. 1981).

<sup>268</sup>In 1978, the Indiana Court of Appeals acknowledged the inconsistency and said that because a trial court is bound by a plea agreement under a more recent statute, the court should not inform the defendant that it is not bound by the agreement. *Elmore v. State*, 176 Ind. App. 306, 308, 375 N.E.2d 660, 662 n.3, *rev'd on other grounds*, 269 Ind. 532, 382 N.E.2d 893 (1978). The inconsistency was finally corrected by the legislature. See IND. CODE § 35-35-1-2(4) (1982).

<sup>269</sup>454 N.E.2d at 417.

<sup>270</sup>455 N.E.2d 343 (Ind. 1983).

<sup>271</sup>*Id.* at 345 (quoting the Record at 71-73).

Formerly, laches operated as an affirmative defense that, once raised by the State, required the petitioner to explain his delay in filing a petition for post-conviction relief.<sup>272</sup> Recently, in *Twyman v. State*,<sup>273</sup> the Indiana Supreme Court modified the established procedure:

The law in Indiana is still that once the State raises the affirmative defense of laches in a post-conviction relief proceeding the petitioner is entitled to an evidentiary hearing upon the issue, before the judge may find laches applies. The burden of proving the defense rests entirely upon the State. The petitioner may prove evidence to negate the State's evidence, but this in no way shifts the onus to the petitioner to disprove laches.<sup>274</sup>

The State's burden of going forward and raising the laches defense would be accomplished in most cases by the State simply pleading laches and showing the passage of a long period of time. Once the issue is raised, the petitioner for post-conviction relief is entitled to an evidentiary hearing. The burden of proving laches remains on the State, and the petitioner may attempt to rebut the State's evidence. There are three elements of a laches defense: (1) the petitioner's knowledge of existing conditions and his acquiescence in them; (2) unreasonable delay in asserting a right; (3) prejudice to the party asserting laches.<sup>275</sup>

Before *Twyman*, the burden was on the defendant to show an excuse for an unreasonable delay. After *Twyman*, the State will have to prove the three elements of laches. The first element should be simple for the State to prove: The defendant will know he has been convicted of a crime and, in most cases where laches will be asserted, the defendant will not have taken a previous appeal.<sup>276</sup> The second element, unreasonableness of delay, must be decided on a case-by-case basis. The most difficult element for the State to prove may be the element of prejudice. A recent post-*Twyman* case, however, affirmed the State's laches defense where the State demonstrated prejudice by showing that the accomplice who had given a statement to the police which supported probable cause had died, that the sheriff's files pertaining to the case could not be located, and that the deputy sheriff who was the chief investigating officer had no independent recollection of the case.<sup>277</sup>

4. *Jury Trial*—*a. Waiver of Jury Trial*.—In Indiana, a trial judge is not constitutionally required to explain to a defendant the difference

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<sup>272</sup>*Stutzman v. State*, 427 N.E.2d 724 (Ind. Ct. App. 1981).

<sup>273</sup>459 N.E.2d 705 (Ind. 1984).

<sup>274</sup>*Id.* at 712. See also *Gregory v. State*, 463 N.E.2d 464 (Ind. 1984).

<sup>275</sup>*Frazier v. State*, 263 Ind. 614, 617, 335 N.E.2d 623, 624 (1975).

<sup>276</sup>See, e.g., *Morrison v. State*, 466 N.E.2d 783 (Ind. Ct. App. 1984).

<sup>277</sup>*Harrington v. State*, 466 N.E.2d 1379 (Ind. Ct. App. 1984). But see *Mottern v. State*, 466 N.E.2d 488 (Ind. Ct. App. 1984).

between a bench trial and a jury trial, nor is the record required to demonstrate that the defendant understands this difference before he can be held to have validly waived his right to a jury trial.<sup>278</sup> However, the waiver of a jury trial must be made personally by the defendant; it must be reflected in the record, and must be entered in writing or in open court before the trial begins.<sup>279</sup>

A variation on these general rules operates for misdemeanor prosecutions, which are governed by a special criminal rule. Criminal Rule 22 provides:

A defendant charged with a misdemeanor may demand a trial by jury by filing a written demand therefor not later than ten (10) days before his scheduled trial date. The failure of a defendant to demand a trial by jury as required by this rule shall constitute a waiver by him of trial by jury unless the defendant has not had at least fifteen (15) days advance notice of his scheduled trial date and of the consequences of his failure to demand a trial by jury.<sup>280</sup>

The Indiana Court of Appeals construed this rule in *Wilson v. State*.<sup>281</sup> In that case, the court of appeals reversed the defendant's convictions for driving while intoxicated and unsafe lane movement because the trial court failed to explain to the defendant the consequences of his failure to demand a trial by jury.<sup>282</sup> If the charged offenses had been felonies, the waiver of a jury trial would have been governed by the general rules which require the defendant's personal waiver on the record before trial. But because the offenses charged were misdemeanors, Criminal Rule 22 applied. Because the record did not indicate that the defendant had notice of the consequences of his failure to demand a jury trial, the court of appeals reversed and remanded.<sup>283</sup>

If Criminal Rule 22 creates an exception to the jury trial waiver rules for felonies, as the court of appeals suggested, then the reason for the exception is clear. By statute, all criminal trials are tried to a jury unless there is a joint waiver by the defendant, the prosecutor, and the judge.<sup>284</sup> A jury trial is the norm unless explicitly waived. But in misdemeanor cases, by operation of Criminal Rule 22, all trials are tried to the bench unless there is a timely demand for a jury trial by the

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<sup>278</sup>*Earl v. State*, 450 N.E.2d 49 (Ind. 1983); *Kennedy v. State*, 271 Ind. 382, 393 N.E.2d, 139 (1979), *cert. denied* 444 U.S. 1047 (1980).

<sup>279</sup>*Good v. State*, 267 Ind. 29, 366 N.E.2d 1169 (1977).

<sup>280</sup>IND. R. CRIM. P. 22.

<sup>281</sup>453 N.E.2d 340 (Ind. Ct. App. 1983).

<sup>282</sup>*Id.* at 341-342.

<sup>283</sup>*Id.* at 342.

<sup>284</sup>IND. CODE § 35-37-1-2 (1982).

defendant. In this context, it is only fair that the trial court advise the defendant at a time sufficiently in advance of the time he must demand a jury trial that he will waive it unless he requests a jury. Criminal Rule 22 does not, however, alter the rule that the trial court need not explain to a defendant the difference between a bench trial and a jury trial.

*b. Defenses.—1. Insanity Defense.*—The Indiana legislature once again changed state law regarding the insanity defense. In 1978, the General Assembly shifted the burden of proof to the defendant to establish the defense of insanity.<sup>285</sup> In 1981, Indiana adopted the plea of guilty but mentally ill.<sup>286</sup> This year, the legislature amended the definition of the defense itself.<sup>287</sup> The new definition provides:

(a) A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense.

(b) As used in this section, “mental disease or defect” means a severely abnormal mental condition that grossly and demonstrably impairs a person’s perception, but the term does not include an abnormality manifested only by repeated unlawful or antisocial conduct.<sup>288</sup>

This redefinition of the insanity defense statute eliminates that part of the defense which absolved a person of responsibility for his crime if he was unable, by reason of mental disease or defect, to conform his conduct to the requirements of the law. By eliminating the “irresistible impulse” prong of the insanity defense, the legislature determined that a defendant in Indiana will now only be able to prove his insanity by showing that he was unable to appreciate the wrongfulness of the conduct at the time of the offense. Although the amendment strikes the “substantial capacity” language from the statute, the new definition of “mental disease or defect” perhaps serves the same purpose, since the mental disease or defect that affects the ability to appreciate the wrongfulness of the conduct must be a “severely abnormal mental condition that grossly and demonstrably impairs a person’s perception.”<sup>289</sup>

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<sup>285</sup>Act of Mar. 8, 1978, Pub. L. No. 145, § 9, 1978 Ind. Acts 1326 (codified at IND. CODE § 35-41-4-1 (1982)).

<sup>286</sup>Act of May 5, 1981, Pub. L. No. 298, § 5, 1981 Ind. Acts 2372 (codified at IND. CODE § 35-36-2-3 to -5 (1982)).

<sup>287</sup>Act of Feb. 24, 1984, Pub. L. No. 184-1984, 1984 Ind. Acts 1501 (codified at IND. CODE § 35-41-3-6 (Supp. 1984)).

<sup>288</sup>IND. CODE § 35-41-3-6 (Supp. 1984).

<sup>289</sup>*Id.*

Another case of procedural significance in the insanity defense area, *Buhring v. State*,<sup>290</sup> was decided during the survey period. By statute in Indiana, the State opens and closes the final arguments to the jury in a criminal case.<sup>291</sup> In *Buhring*, the defense attorneys contended that because they bore the burden of proof on the insanity defense, they should be permitted to open and close final arguments. The Indiana Supreme Court rejected this contention.<sup>292</sup>

Indiana's guilty but mentally ill statute survived a constitutional attack in *Stader v. State*.<sup>293</sup> In that case, the defendant argued that the guilty but mentally ill statute<sup>294</sup> was unconstitutional as applied to him because he was not receiving any form of treatment or psychiatric therapy after having been found guilty but mentally ill. The court of appeals ruled this was a challenge to the conditions of his detention which could not be asserted on direct appeal. The court said that when inmates challenge the conditions of their custody, the issue must be raised by a writ of mandamus, a writ of prohibition, or a civil rights action.<sup>295</sup>

2. *Intoxication*.—In *Johnson v. State*,<sup>296</sup> the supreme court answered the question of whether or not intoxication is a defense to an *attempt* to commit a crime. Historically, the intoxication defense has been limited to specific intent crimes.<sup>297</sup> Attempt has been held to be a specific intent crime.<sup>298</sup> Therefore, it would seem obvious that the intoxication defense should apply in attempt cases. The intoxication defense statute provides that “[v]oluntary intoxication is a defense only to the extent that it negates an element of an offense referred to by the phrase ‘with intent to’ or ‘with an intention to.’”<sup>299</sup> Confusion resulted because the attempt statute itself contains no such language.<sup>300</sup> Nevertheless, in *Johnson*, the supreme court decided that the intoxication defense applies in an attempt case.<sup>301</sup>

c. *Jury Instructions*.—1. *Attempt*.—In *Smith v. State*,<sup>302</sup> the Indiana Supreme Court held that it was fundamental error not to instruct the jury that a specific intent is required to prove attempted murder. In

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<sup>290</sup>453 N.E.2d 228 (Ind. 1983).

<sup>291</sup>IND. CODE § 35-37-2-2 (1982).

<sup>292</sup>453 N.E.2d at 231.

<sup>293</sup>453 N.E.2d 1032 (Ind. Ct. App. 1983).

<sup>294</sup>IND. CODE § 35-36-2-5 (1982).

<sup>295</sup>453 N.E.2d at 1036.

<sup>296</sup>455 N.E.2d 932 (Ind. 1983).

<sup>297</sup>See *Carter v. State*, 408 N.E.2d 790, 794 (Ind. Ct. App. 1980).

<sup>298</sup>*Zickefoose v. State*, 270 Ind. 618, 388 N.E.2d 507 (1979).

<sup>299</sup>IND. CODE § 35-41-3-5(b) (1982).

<sup>300</sup>IND. CODE § 35-41-5-1 (1982).

<sup>301</sup>455 N.E.2d at 937.

<sup>302</sup>459 N.E.2d 355 (Ind. 1984).

*Smith*, the jury was instructed that for the crime of attempted murder the State must prove beyond a reasonable doubt that the defendant knowingly engaged in conduct which constituted a substantial step toward murder. The defendant raised no objection to this instruction, nor apparently did he tender his own instruction on the intent required for an attempt.<sup>303</sup> The defendant's failure to object would ordinarily be considered a waiver of any error, but a close majority of the supreme court held that the error was fundamental and thus subject to review even though not properly preserved.<sup>304</sup>

The dissent in *Smith* agreed that the concept of specific intent could have been made clearer to the jury. In addition to the specific instruction on attempted murder, however, the jury was instructed on the definitions of "intentionally" and "knowingly," and instructed that the intent to kill could be inferred from the use of a deadly weapon in a manner likely to cause death. Also, the charging instrument that alleged that the defendant stabbed the victim with the intent to kill was read to the jury. Under these instructions taken as a whole, the dissent believed that the failure to more carefully define the specific intent requirement for attempts could not be considered a fundamental error.<sup>305</sup>

The court of appeals handed down another decision which demonstrated how careful courts must be when instructing juries on attempt crimes. In *Vandeventer v. State*,<sup>306</sup> the defendant was charged with attempted voluntary manslaughter. He was found guilty but mentally ill of attempted reckless homicide. The defendant had tendered an instruction which said that the defendant could be convicted of attempted reckless homicide as an included offense of attempted voluntary manslaughter and this instruction was given by the trial court. Nevertheless, attempted reckless homicide was not an offense under Indiana law because the attempt statute applies only to specific intent crimes. The issue on appeal was whether a conviction of a nonoffense could be permitted to stand on the basis of invited error.<sup>307</sup> The State argued that the error was invited by the defendant who tendered the included offense instruction, and that the defendant could not profit from obtaining an erroneous instruction and then claiming the error on appeal.<sup>308</sup> The court held,

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<sup>303</sup>*Id.* at 357.

<sup>304</sup>*Id.* at 358. Note that *Smith v. State* was a 3:2 decision.

<sup>305</sup>*Id.* at 363. *Cf.* *Blackmon v. State*, 455 N.E.2d 586 (Ind. 1983) (failure of jury instructions to inform jurors of specific intent requirement was error waived on appeal, not elevated to fundamental error status).

<sup>306</sup>459 N.E.2d 1221 (Ind. Ct. App. 1984), *transfer denied*, May 22, 1984.

<sup>307</sup>*Id.* (citing *Stamper v. State*, 260 Ind. 211, 294 N.E.2d 609 (1973); *Moore v. State*, 445 N.E.2d 576 (Ind. Ct. App. 1983)).

<sup>308</sup>459 N.E.2d at 1222.

however, that the invited error doctrine did not apply when it would result in a conviction for a nonexistent offense.<sup>309</sup>

2. *Signing Instructions.*—Indiana Code section 35-37-2-2(6) provides that special jury instructions tendered by a party are required to be reduced to writing, numbered, and signed by the party or his attorney.<sup>310</sup> Previously, the Indiana Supreme Court had held that no claim of error could be predicated on the failure to give an instruction that was not numbered and signed.<sup>311</sup> Recently, in *Harding v. State*,<sup>312</sup> the defense attorney had numbered the instructions and signed only the cover sheet of the instructions. The supreme court held that this too was insufficient to comply with the statute.<sup>313</sup>

d. *Replaying of Testimony for Jurors.*—In the past, Indiana courts have held that, upon jury request, the trial court must replay any testimony given in open court or reread any documentary evidence introduced at trial.<sup>314</sup> Trial courts have discretion to refuse such a jury request,<sup>315</sup> although this discretion may be limited.<sup>316</sup> Yet in *Shaffer v. State*,<sup>317</sup> the Indiana Supreme Court reversed a conviction because the jury was permitted to hear more than three hours of the tape-recorded testimony of witnesses and the defendant. The court distinguished its earlier decisions which seemed to permit the trial court's action, on the basis of the amount of testimony to be replayed, holding that a trial court may not permit a virtual replay of the entire trial especially when there were numerous contradictions in the testimony.<sup>318</sup>

e. *Post-Trial Attacks on Verdicts.*—Two decisions during the survey period discussed post-trial attacks on jury verdicts based upon allegedly improper, extraneous influences on jurors. In *Fox v. State*,<sup>319</sup> the defendant contended she was denied a fair trial because of the jury's exposure to extraneous prejudicial material. On the morning after the jury reached a midnight verdict of guilty in a robbery trial, the court

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<sup>309</sup>*Id.*

<sup>310</sup>IND. CODE § 35-37-2-2(6) (1982).

<sup>311</sup>*Askew v. State*, 439 N.E.2d 1350 (Ind. 1982).

<sup>312</sup>457 N.E.2d 1098 (Ind. 1984).

<sup>313</sup>*Id.* at 1101.

<sup>314</sup>*See Harris v. State*, 269 Ind. 672, 382 N.E.2d 913 (1978); *Ortiz v. State*, 265 Ind. 549, 356 N.E.2d 1188 (1976).

<sup>315</sup>*Douglass v. State*, 441 N.E.2d 957 (Ind. 1982); *Smith v. State*, 270 Ind. 579, 388 N.E.2d 484 (1979).

<sup>316</sup>*Ortiz v. State*, 265 Ind. 549, 564-65, 356 N.E.2d 1188, 1197 (1976) (citing American Bar Association, *Standards for Criminal Justice, Trial by Jury*, Commentary at 134-37 (approved draft 1968)).

<sup>317</sup>449 N.E.2d 1074 (Ind. 1983).

<sup>318</sup>*Id.* at 1076.

<sup>319</sup>439 N.E.2d 1385 (Ind. Ct. App. 1982).

bailiff found a *Newsweek* magazine in the jury room. The magazine's cover bore the legend, "The Epidemic of Violent Crime," and was illustrated by a picture of a gloved hand pointing a revolver directly at the viewer. The magazine contained an eight-page feature article on crime. The bailiff's affidavit reciting these facts was attached to the defendant's motion to correct errors. The court of appeals remanded the case to the trial court with instructions to reassemble the jury for a voir dire examination pursuant to the guidelines of *Lindsey v. State*.<sup>320</sup> The supreme court reversed, holding that *Lindsey* did not apply to the post-verdict stage.<sup>321</sup>

It is not reasonable . . . and would be counterproductive to require the judge, after a verdict has been returned, to run willy-nilly in search of evidence of a prejudicial impropriety upon the mere *claim* of a *possible* impropriety which, if it did in fact, occur, *possibly* harmed the claimant. The *Lindsey* procedures are not appropriate and are not available for attacking a verdict.<sup>322</sup>

The court introduced the guidelines for ruling upon this kind of post-verdict attack: "If, and only if, a claimant establishes, by a preponderance of the evidence, that the jury saw or heard the material complained of, should the judge be put to the task of determining the likelihood of the verdict having, thereby been polluted."<sup>323</sup> Therefore, a post-verdict claim of jury taint based on exposure to prejudicial extraneous material should allege, as a matter of fact, that exposure occurred. The fact of exposure should be supported by affidavits or, in the trial court's discretion, testimony.<sup>324</sup>

The Indiana Court of Appeals addressed a related issue in *Berkman v. State*,<sup>325</sup> that of an improper internal influence on a jury. In that case, the defendant was on trial for dealing in cocaine. On appeal, the defendant alleged that one of the jurors was biased against persons charged with selling drugs and that the juror concealed this bias on voir dire. The defendant supported this allegation by attaching an affidavit of an unselected venireman who said that the challenged juror "expressed a predisposition of guilt towards individuals charged with drug related

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<sup>320</sup>260 Ind. 351, 295 N.E.2d 819 (1973) (established procedures examining jurors allegedly exposed to prejudicial information during trial).

<sup>321</sup>457 N.E.2d 1088, 1094 (Ind. 1984).

<sup>322</sup>*Id.* at 1092 (citation omitted). The court stated that applying the *Lindsey* rule after a verdict is reached would lead to jurors impeaching their own verdicts, an outcome contrary to Indiana law. *Id.* (citing *Wilson v. State*, 253 Ind. 585, 255 N.E.2d 817 (1970); *Davis v. State*, 249 Ind. 426, 231 N.E.2d 230 (1967)).

<sup>323</sup>457 N.E.2d at 1093-94.

<sup>324</sup>*Id.* at 1093.

<sup>325</sup>459 N.E.2d 44 (Ind. Ct. App. 1984), *transfer denied*, May 30, 1984).

offenses.””<sup>326</sup> The trial court denied the defendant’s motion for a new trial without a hearing.

The court of appeals found that the affidavit was insufficient to warrant a new trial or even an evidentiary hearing: “[A] defendant seeking a hearing on juror misconduct must first present some specific, substantial evidence showing a juror was possibly biased,” the court stated.<sup>327</sup> The affidavit in *Berkman* merely stated the prospective juror’s own conclusions that the juror was biased, without stating the facts on which that belief was based.

Thus, both *Fox* and *Berkman* indicate that a defendant challenging a jury verdict based upon some improper influence on the jury, external or internal, must support his claim with very specific affidavits.

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<sup>326</sup>*Id.* at 45 (quoting the affidavit).

<sup>327</sup>*Id.* at 46.

