neous evidence been excluded; a willingness to permit more hearsay rule exceptions because of the need for the evidence and its probable reliability; an acceptance of scientific evidence such as blood grouping tests; and an indication that the results of polygraph tests taken under appropriate circumstances may be admissible in the near future. This survey indicates that evidential matters are not critical in leading to reversals in appellate litigation, and this is probably appropriate. This result reflects a belief that technical evidentiary errors made by trial judges should not be a basis for reversal when the result of the trial would not otherwise be changed. Errors are often made by a trial judge due to the myriad rulings on evidential points which must be made without the adequate opportunity for reflection and study afforded appellate judges. The appellate judges of Indiana have shown that they understand this reality in the trial of cases and have shaped the law of evidence to achieve substantial justice.

IX. Evidence—Criminal

*William Marple**

A. Demonstrative Evidence

1. Bodily Invasions

Two extremely important cases involving the obtaining of demonstrative evidence from the body of an accused reached results not entirely consistent with each other. The supreme court decided, over dissent, in *Adams v. State*,[1] that court-ordered surgery to remove bullet fragments from beneath the surface of the defendant's skin was an impermissible invasion of his fourth amendment rights. The defendant was arrested as a suspect in a supermarket robbery, during which it was believed that he had been wounded by a shot fired by the police. When he was apprehended several weeks later, the police officers observed two bullet wounds, and an X-ray examination showed metallic fragments in his flesh. The police filed an affidavit for the purpose of obtaining a search warrant to retrieve the bullets from his body. In addition to stating the

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[1]299 N.E.2d 834 (Ind. 1973), *cert. denied*, 94 S. Ct. 1452 (1974). The denial of the petition for certiorari contained the notation that the judgment below rested upon an adequate state ground.

reasons for believing that the wounds contained bullets, the affidavit named the doctor who would perform the surgery and stated the doctor's opinion that the procedure was minor and would not harm the defendant.[2]

After surveying the United States Supreme Court decisions[3] involving bodily searches, the court distinguished *Schmerber v. California*,[4] which permitted a compulsory blood test and the admission of the results thereof. Whereas in *Schmerber* the bodily intrusion was characterized as minor, in *Adams*, the court was "confronted with an intrusion of the most serious magnitude."[5] The court held that, although the introduction of the bullets into evidence did not violate defendant's constitutional privilege against self-incrimination, since this is a privilege only against *testimonial* compulsion,

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[2]The affidavit contained a statement that a reliable confidential informer had told the affiant that Adams was one of the robbers who had been shot and that Adams had two bullet holes in him. It stated the informer's reliability and facts relating to the robbery. It did not, however, state facts explaining how the informant obtained his information. More importantly, the affidavit set forth the opinions of medical doctors that the fragments were bullets, named the doctor who would perform the operation, and stated that the fragments could be "quickly and easily removed from the tissue in a minor procedure . . . and that said procedure would involve no pain, discomfort, or risk" to the defendant. 299 N.E.2d at 841.

[3]In Cupp v. Murphy, 412 U.S. 291 (1973), the Court upheld a warrantless taking of evidence from under a suspect's fingernails. In United States v. Dionisio, 410 U.S. 1 (1973), and United States v. Mara, 410 U.S. 19 (1973), the Court held that a forced handwriting sample, and a coerced voice exemplar, respectively, did not violate the fourth amendment. All of the above intrusions were much more limited than the one in *Adams*. In Rochin v. California, 342 U.S. 165 (1952), the Court found a forced stomach pumping of an accused per se unreasonable, regardless of whether the evidence seized would be testimonial or demonstrative. This case was the basis for the holding in *Adams*.

[4]384 U.S. 757 (1966). In *Schmerber*, after the defendant's arrest, a blood sample to determine intoxication was taken at the direction of a policeman acting without a search warrant. The majority in *Adams* correctly pointed out that the decision in the *Schmerber* case was carefully limited by the following language:

> The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions . . . .

Id. at 772.

[5]299 N.E.2d at 837. The court also relied on the earlier Indiana case of Alldredge v. State, 239 Ind. 256, 156 N.E.2d 888 (1959), which permitted the use of a breathalyzer test only if there was no invasion of the defendant's body.

the surgery was, nevertheless, an unreasonable invasion of the defendant's body.[6]

Justice Prentice's dissent adduces the majority's improper reliance on *Rochin v. California.*[7] In *Rochin,* the police entered the defendant's house, arrested him, and later had his stomach pumped —all without a warrant. In *Adams,* however, there was not only a prior judicial determination of probable cause to believe that the defendant had been involved in the robbery, but there was also probable cause to believe that evidence was embedded in the defendant's hip and that there was no danger to him in performing the operation. The dissent proposed that the accused be afforded a hearing on the questions of the seriousness of the operation and whether he might be injured by it.

It is difficult to imagine an instance in which physical evidence would be located inside the accused's body and its removal, following proper medical procedures, would be harmful to the accused. Indeed, it seems that in most cases, as in *Adams,* the surgery would be beneficial to the defendant. In any event, a prior hearing would guard against the danger, feared by the majority, that any sanctioning of surgical invasions might lead to radical explorations such as lobotomies or open heart surgery. The hearing should be adversarial in nature, as opposed to the ex parte application for a warrant in *Adams.* Otherwise, the defendant would have no opportunity to present reasons why the operation might be harmful.

Prior to the *Adams* decision, the court of appeals in *Foxall v. State*[8] upheld the forceable removal, with the aid of a shoehorn, of foil packets from the suspect's mouth. Police officers searched Foxall's apartment pursuant to a warrant and found a television set which matched the description of one listed in the warrant. After placing Foxall under arrest, one of the officers noticed him attempting to place something in his mouth. A struggle ensued during which the suspect suffered three broken ribs, a bruised lip, and a slight injury to one eye. Two of the police officers were bitten but, with the aid of the plastic shoehorn, several packets of heroin were removed from Foxall's mouth.

The defendant relied on *Rochin* to challenge the introduction of this evidence against him. The court of appeals noted two impor-

[6]Even under the majority view, nothing would prevent a witness from testifying about the marks and scars he observed on the defendant's body. In Ross v. State, 204 Ind. 281, 182 N.E. 865 (1932), the court stated that testimonial incrimination only results from the "employment of legal process to *extract from the person's own lips* an admission of his guilt, which will thus take the place of other evidence." *Id.* at 292-93, 182 N.E. at 869 (emphasis in original).

[7]342 U.S. 165 (1952).

[8]298 N.E.2d 470 (Ind. Ct. App. 1973).

tant factors which distinguished *Foxall* from *Rochin*. In *Rochin*, the search was conducted without a warrant and was illegal from its inception. However, in *Foxall*, the search followed an arrest which occurred during the orderly execution of a valid search warrant.[9] More significantly, the narcotics in *Rochin* were removed from the defendant's stomach through the use of a stomach pump while, in the present case, the heroin was merely taken from Foxall's mouth.[10]

Since there was no surgical invasion of defendant's body, the *Foxall* case is not expressly contrary to *Adams*.[11] Although Foxall suffered harm, it was a result of his resistance to the legally executed search; the harm from swallowing the heroin could have been much greater, even fatal, to him. So long as a search is valid and so long as the force used does not amount to outright brutality of a shocking nature, the police should be allowed to prevent the imminent destruction of incriminating evidence.

2. *Tape Recordings*

In *Layton v. State*,[12] the supreme court explained that the requirements for admitting a tape recording, as set forth in *Lamar v. State*,[13] were met even though the tape-recorded version of the defendant's pre-trial confession did not contain the necessary warnings of rights. The *Lamar* court held, as one of five criteria to estab-

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[9]Although Foxall challenged the search warrant, which was based on information from an undisclosed informant, the court found that the warrant met the requirements of Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); and IND. CODE § 35-1-6-2 (IND. ANN. STAT. § 9-602, Burns Repl. 1956), all of which deal with the standards for the proper issuance of a warrant based upon hearsay.

A recent United States Supreme Court case made clear that there are two levels at which a fourth amendment violation may occur—upon the initial seizure of the person which brings him into contact with government agents, and upon the subsequent search for and seizure of evidence. United States v. Dionisio, 410 U.S. 1, 8 (1973). In *Rochin*, the initial seizure of the person was illegal, so the Court did not need to consider the question of the seizure of the evidence inside Rochin's stomach.

[10]The court of appeals cited three cases from other jurisdictions which reached the same result on very similar facts. United States v. Harrison, 432 F.2d 1328 (D.C. Cir. 1970); People v. Tahtinen, 210 Cal. App. 2d 755, 26 Cal. Rptr. 864 (1962), *cert. denied*, 375 U.S. 842 (1963); State v. Santos, 101 N.J. Super. 98, 243 A.2d 274 (1968).

[11]Language in Alldredge v. State, 239 Ind. 256, 156 N.E.2d 888 (1959), would seem to prohibit any physical invasion of a suspect's body to which the suspect does not consent. However, in the recent case of Brattain v. Herron, 309 N.E.2d 150, 158 (Ind. Ct. App. 1974), the court stated that *Alldredge* was "distinguished, if not overruled" by *Adams*.

[12]301 N.E.2d 633 (Ind. 1973).

[13]282 N.E.2d 795 (Ind. 1972), *noted in Evidence, 1973 Survey of Indiana*

lish a foundation for the admission of a tape recording, that all required warnings be given and all necessary waivers of constitutional rights be obtained.[14] Further, the *Lamar* court noted that it would be preferable for the warnings and waivers to be present on the tape as well as on the written documents.[15] The *Layton* court, however, stated that the medium through which the necessary waiver must be obtained was not delimited by *Lamar* and refused to extend the earlier case to require that the tape reflect the warnings and waiver.[16] Since the court found that Layton's confession was voluntary, the tape of the confession and the written transcript were properly admitted.

The *Layton* result is questionable. Added protection would be given to both the accused and the State if the warnings and waivers were required to be on the tape. In this manner, the State could conclusively establish that the warnings were given and the waiver obtained. If the warnings and waivers are not on the tape, in light of the devastating effect of a tape-recorded confession played to a jury and the lack of any justification for not recording the warnings and waivers, the court should draw an inference adverse to the State or at least be willing to more carefully scrutinize the voluntariness of the confession.[17]

3. Scientific Evidence

In *Sizemore v. State,*[18] a prosecution for possession of dangerous drugs, the court of appeals refused to recognize any distinction between Cannabis indica and Cannabis sativa. The police expert testified for the State that the substance seized from the defendant was marijuana. On cross-examination, he was asked if he had tested the substance to determine if it was Cannabis indica or Cannabis sativa. He answered that he had not. Since an Indiana statute[19] in

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Law, 7 IND. L. REV. 176, 182 (1973).

[14]282 N.E.2d at 798.

[15]*Id.*

[16]301 N.E.2d at 634-35. The supreme court had reached the same result as the *Layton* court in a case preceeding *Lamar*. Schmidt v. State, 255 Ind. 443, 265 N.E.2d 219 (1970).

[17]The danger of a police refusal to give the warnings in order to extract a confession on tape was frightfully presented by Justice Jackson in his dissent in Schmidt v. State, 255 Ind. 443, 458, 265 N.E.2d 219, 233 (1970). In that case, a woman was convicted of first degree murder and her conviction was upheld solely on the basis of a purely exculpatory tape-recorded interview that did not reflect the required warnings or waiver. On habeas corpus petition, her conviction was reduced to manslaughter. Schmidt v. State, 300 N.E.2d 86 (Ind. 1973).

[18]308 N.E.2d 400 (Ind. Ct. App. 1974).

[19]See Ind. Pub. L. No. 212, § 1 (April 2, 1971) (repealed 1973). The language of the current statute is found at IND. CODE § 16-6-8-2 (Burns 1973).

effect at the time only specifically prohibited Cannabis sativa, the defendant argued that, in the absence of a test to distinguish the two substances, the State failed to prove that the substance in question was a dangerous drug. Rejecting this argument, the court held that there is only one species of marijuana.[20]

In *Klebs v. State*,[21] wherein the defendant had been convicted of causing death while driving under the influence of alcohol, the court outlined the technical statutory foundation that must precede the admission of breathalyzer test results.[22] The three requirements for a proper foundation are that the test operator be certified, that the equipment be inspected and approved, and that the techniques used by the operator be approved.[23] The court of appeals found fatal evidentiary absences germane to each of the three requirements. The record did not show that the operator was certified, that the equipment was approved, or that the operator's technique had been approved. In light of independent testimony regarding the amount of toxicants consumed and the defendant's

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[20]The court relied on United States v. Moore, 446 F.2d 448 (3d Cir. 1971), which held, on similar facts, that the *federal* statute prohibited possession of all forms of marijuana. In the *Moore* case, it was necessary to equate all forms because the federal statute said "marihuana means all parts of the plant Cannabis sativa . . . ." 26 U.S.C. § 4761(2) (1970). In *Sizemore*, it was unnecessary to equate Cannabis sativa and Cannabis indicia because of the language of the Indiana statute then in effect. The statute provided that dangerous drugs included Cannabis and in a later passage defined Cannabis to *include* Cannabis sativa, but it did not limit the prohibition to only Cannabis sativa. It seems clear that all forms of Cannabis were thus prohibited.

[21]305 N.E.2d 781 (Ind. Ct. App. 1974).

[22]Evidence of .10 percent or more alcohol in the blood is prima facie evidence of intoxication. IND. CODE § 9-4-1-56 (Burns 1973). The results of the breathalyzer test in *Klebs* indicated that the defendant's blood alcohol content was .19 percent.

[23]305 N.E.2d at 783. These requirements were extracted from both the statutes and the regulations. IND. CODE § 9-4-4.5-6 (Burns Supp. 1974) gives the director of the state department of toxicology of the Indiana University school of medicine the authority to adopt necessary rules and regulations setting forth standards for certification of test operators and providing for periodic inspection of chemical devices. The statute contains the limitation that no test is admissible in evidence unless the test operator is certified by the department of toxicology and the equipment has been inspected and approved. The regulations provide for operator certification only after the operator has taken a course in chemical test devices. The certification is valid for two years. IND. AD. RULES & REG. (47-2003h)-1 (Burns Supp. 1974). Another statute provides that the operator's techniques must be approved by the department of toxicology. IND. CODE § 9-4-4.5-2 (Burns 1973).

erratic driving behavior before the fatal crash, however, the court found the errors harmless.[24]

4. *Photographs*

Warrenburg v. State[25] contains a warning to prosecutors and trial courts alike to exercise greater care and discretion in using and admitting gruesome photographs. Warrenburg was convicted of involuntary manslaughter and, on appeal, objected to the admission of a color photograph of the deceased taken after an autopsy was performed. The photograph showed the partially resewn corpse, nude from the waist up, with the right arm severed completely and the left arm reattached with gaping sutures. Since the doctor who performed the autopsy testified that the victim died as a result of blows to the head, the surgical incisions on the corpse were irrelevant. Only the part of the exhibit showing the bruises on the victim's skull should have been admitted. In light of the other evidence in the case, however, the court found that the admission of the photograph was a harmless error.[26]

In two other cases, the supreme court upheld the admissibility of photographs. In *Hubble v. State*,[27] a photograph of a drive-in theater, the scene of a burglary, taken three months after the commission of the crime was held properly admitted even though the premises had changed. The stolen goods had been hidden in the

[24]Defendant had consumed eight to ten bourbon drinks over a three and one-half hour period. Witnesses testified that Kleb's auto had weaved across the center line several times. The court applied the rule that it will not disturb the judgment of the trial court if there is substantial evidence to establish every element of the crime charged. 305 N.E.2d at 784, *citing* Phillips v. State, 295 N.E.2d 592 (Ind. 1973); Dunn v. State, 293 N.E.2d 32 (Ind. 1973).

[25]298 N.E.2d 434 (Ind. 1973).

[26]The court seemed to be espousing the rule suggested in last year's survey that, "when photographs are not necessary to prove the fact but are used as cumulative evidence, the probative value may not outweigh the prejudicial effect." *Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 178-79 n.15 (1973), *citing* Keifer v. State, 239 Ind. 103, 153 N.E.2d 899 (1958), *noted in* 8 DEPAUL L. REV. 418 (1959). *But see* 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1231, at 74 (2d ed. 1969), wherein the author states: "It is obviously retrogressive to follow the rule that relevant photographs of gruesome subjects should be admitted in evidence only when they are necessary." *Accord*, Hewitt v. State, 300 N.E.2d 94, 98 (Ind. 1973) (the *Keifer* case said to be very limited in its application); Blevins v. State, 291 N.E.2d 84 (Ind. 1973) (regardless of their gruesome nature, photographs are admissible when what they depict is a proper subject of testimony by witnesses). The law is obviously unclear but the cited cases indicate that post-autopsy photographs which show the body drastically altered are among the most objectionable.

[27]299 N.E.2d 612 (Ind. 1973).

foliage at the theater. Since the photographs showed more foliage than existed on the date of the burglary, the defendant argued that the photographs tended to mislead the jury into believing that a normal passerby could not have seen the goods and, thus, tended unfairly to support the State's contention that the burglar had hidden the goods with the hope of returning the next evening to retrieve them. Since the deputy sheriff had explained at the trial that the photographs showed more foliage than had existed at the time of the crime and since the photographs showed the lay out of the theater premises in addition to showing the shrubbery, the court held the photographs were properly admitted. Without the sheriff's explanation of the change in foliage, the photographs might well have been found prejudicial as an attempt to mislead the jury.

In *Stephens v. State*,[28] photographs of an automobile used in a robbery-kidnap-assault depicted a burnt orange Mercury, whereas the victim told police she was abducted in a red Chevelle. At trial, however, she identified the car in the photograph as the one in which she was abducted. The court said that the defendant's objection went only to the weight of the evidence and not to its admissibility. The defendant also objected to the absence of a proper foundation. Since the photographs were introduced through the victim's testimony, during which she related that the pictures were true and accurate representations of the automobile, the court found that a sufficient foundation had been laid.

The *Stephens* case illustrates the problem of allowing a photograph, in effect, to become the witness. The witness need only look at the photograph and state that it is a fair representation of the scene. Opposing counsel then can only interrupt the examining attorney and ask the witness to describe, without reference to the photograph, whatever scene is depicted. If the witness, in answer to the preliminary question, cannot from his personal recollection describe the contents of the photograph, then the opposing party has effectively discredited the witness' verification. If this procedure had been followed in the present case, the photograph, while still admissible, would have been dramatically discredited.[29] Because opposing counsel waited to impeach the witness on cross-examination through the use of her prior inconsistent identification, the jury was allowed to draw the conclusion that the witness was unin-

[28] 295 N.E.2d 622 (Ind. 1973).

[29] A similar tactic is suggested in 3 C. SCOTT, PHOTOGRAPHIC EVIDENCE § 1496, at 399-40 (2d ed. 1969). The danger of this tactic is obvious—it might backfire. The witness may have been shown the photograph before the trial by opposing counsel and may, thus, be able to accurately describe what it depicts without reference to it. The correct recollection of the witness, coupled with the photographic verification, would very effectively establish the truth of the witness' testimony.

formed about car models and colors but knew the real car when she saw it.

5. *Chain of Custody*

In *Jones v. State*,[30] the supreme court held that a ten day gap between the time when a police officer placed in the police laboratory an envelope alleged to contain heroin and the time when he tested the substance did not create a question of the "exact whereabouts" of the exhibit sufficient to destroy the foundation necessary for its admission. The State did not explain what security measures, if any, were taken to prevent substitution, tampering, or mistake; however, all officers who were known to have handled the exhibits testified at the trial. The court held that it was dealing with "probabilities" of non-interference, not with absolute certainties; the mere possibility that the evidence might have been tampered with was not sufficient to make the evidence totally objectionable.[31] Although the majority recognized the difficulties presented in this case, the majority found it unlikely that anyone without business in the state police laboratory would be present or that anyone would have tampered with the exhibit.[32]

This result is questionable. Justice DeBruler, in his dissent, presents a two stage analysis of the chain of custody requirement. First, the state must establish the "exact whereabouts" of the exhibit during the time it was in police custody. If the exact location of the exhibit cannot be established, the evidence should be excluded without further consideration. It is only when the exact location of the exhibit is clearly established that the court need concern itself with "probabilities."[33] Since the police officer did not testify that

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[30]296 N.E.2d 407 (Ind. 1973).

[31]*Id.* at 409, *citing* Kolb v. State, 282 N.E.2d 541, 546 (Ind. 1972).

[32]A similar break in the chain of custody occurred in Graham v. State, 253 Ind. 525, 255 N.E.2d 652 (1970). A police sergeant removed suspected heroin from the police property room and the heroin was returned six days later by another police officer. The exhibit's whereabouts could not be ascertained from police records nor was it explained by the witnesses since neither of the two officers handling the exhibit testified at the trial. The court in *Graham* stated that, if either of the two police officers had been produced to explain the whereabouts of the exhibit during the six day period, there would likely have been no grounds for challenge.

In *Jones*, even though the officer who deposited the exhibit and later tested it in the laboratory *did* testify, Justice DeBruler, in his dissent, was not satisfied that the exact whereabouts of the exhibit during the entire ten day period had been accounted for. 296 N.E.2d at 411-12.

[33]Justice DeBruler's two stage method of analysis is helpful in evaluating a later case decided by the court of appeals. In Mullins v. State, 306 N.E.2d 398 (Ind. Ct. App. 1974), a police informant went to Mullin's house and purchased a packet of alleged heroin. He left the house and drove to a

the exhibit remained in the laboratory during the entire ten day period, but rather testified only that he took it there and tested it ten days later, the question of whether the exhibit was removed was a matter of conjecture. The failure to establish the exact location at all times should be per se a failure to lay a sufficient foundation. Furthermore, even if the location were established, too many people had access to the laboratory to rule out the possibility of tampering.

Another interesting point made in *Jones* was that the standard of proof which the State must meet in order to establish the foundation for the chain of custody may vary with the circumstances. In the case of goods of a fungible nature, such as narcotics, and especially in those cases in which the evidence is an essential element of the crime, a higher degree of scrutiny must be placed on the exhibit than in the case of ordinary demonstrative evidence.[34]

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nearby park where he delivered the packet to the narcotics officer. Mullins, at his trial for possession and sale of heroin, objected that the informant's three minute trip from the house to the park constituted a break in the chain of custody. The court correctly found that the first requirement of establishing the "exact whereabouts" of the packet was met when the informant testified at trial that he carried the packet directly from Mullins to the narcotics officer. Regarding the second requirement—excluding the probabilities of tampering—the court said that the fact that the informant had much to gain by implicating Mullins (since the informant was apparently being paid to obtain evidence and also since the informant had a drug charge pending against him) merely raised the conjecture of tampering.

In Guthrie v. State, 254 Ind. 356, 260 N.E.2d 579 (1970), the supreme court applied this two stage analysis and held that leaving a slide of a vaginal smear from 12:00 midnight to 8:00 a.m. in a desk at the state police command post did not raise a question as to its exact whereabouts when, as in *Jones*, both the depositor and the receiver of the evidence testified. Graham v. State, 253 Ind. 525, 255 N.E.2d 652 (1970), is distinguishable from *Jones* and *Guthrie* in that the depositor and the receiver did not testify. The question in *Guthrie* was thus a question of probabilities. Since a slide, unlike a small packet of heroin, was not likely to be easily tampered with or substituted, the court found the probabilities of tampering minimal. The two dissenters in *Guthrie* found a break in the chain of custody because the police officer receiving the slide could not identify it as the same one presented to him at trial.

In Kolb v. State, 282 N.E.2d 541 (Ind. 1972), the exact whereabouts of an exhibit of alleged marijuana was established. The only real question related to the probabilities of tampering during a long period of time during which the exhibit was in the police laboratory and police property room. Again, the mere possibility that it may have been tampered with was not sufficient to render it inadmissible.

[34]296 N.E.2d at 409. *Accord,* Guthrie v. State, 254 Ind. 356, 260 N.E.2d 579 (1970) (the burden on the State to prove non-interference was less in the case of slides of vaginal smears than in the case of heroin). *But see* Butler v. State, 289 N.E.2d 772 (Ind. Ct. App. 1972) (the exact whereabouts of an exhibit must be established beyond a reasonable doubt).

In *Bonds v. State*,[35] probably as a result of the confusion engendered by the drug cases, both the trial court and the court of appeals reached the correct result but applied a rule unduly harsh to the State. The defendant was convicted of aggravated assault and battery. The shotgun allegedly used in the crime was offered at the trial. The trial court overruled the defendant's objection of failure to establish a proper chain of custody and held that the chain of custody doctrine does not apply to a gun which does not lend itself to adulteration or substitution. On appeal, the court held that the doctrine does technically apply to the offer of a gun, but that the State's burden of negating the possibility of tampering is less than when narcotics are involved.[36] Since the shotgun was identified by numerous witnesses as the one used by defendant, the court should have applied the rule that chain of custody is not relevant when a witness identifies the object as the actual object about which he has testified.[37]

6. *Polygraph Tests*

The admissibility of polygraph tests in criminal cases is still doubtful. In *Robinson v. State*,[38] the court of appeals, while advocating the future admissibility of these tests, seems clearly wrong in upholding the trial court's exclusion of polygraph results. The defendant apparently wanted to introduce polygraph results which

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[35]303 N.E.2d 686 (Ind. Ct. App. 1973).

[36]*See* notes 32-34 *supra*.

[37]This rule was applied in United States v. Blue, 440 F.2d 300 (7th Cir. 1971). In a prosecution for bank robbery, the defendant objected to the introduction of twenty-two silver dollars. The FBI office in Washington, D.C., sent the dollars (retrieved from an innocent third party) by mail to the United States Marshall, thus providing the break in the chain of custody to which the defendant objected. At trial, a coin expert identified the twenty-two coins as the ones he had purchased from one of the co-defendants. Therefore, the Government did not need to prove the chain of custody. The court perceptively distinguished the case of United States v. Panczko, 353 F.2d 676 (7th Cir. 1965). In *Panczko*, a prosecution for illegal possession of post office keys, the witness could not positively identify the keys as the ones connected with the crime. Therefore, it was necessary to establish a chain of custody of the keys.

In Holloway v. State, 300 N.E.2d 910 (Ind. Ct. App. 1973), a chain of custody objection was held not validly applied to the introduction of a paper sack containing two billfolds, miscellaneous papers, and some money, since a witness identified the items as the ones he had seized during the arrest of the defendant. Proposed Fed. R. Evid. 901(b)(1), 56 F.R.D. 183 (1972) [hereinafter cited as Proposed Fed. R. Evid.], provides that "testimony that a matter is what it is claimed to be is sufficient identification."

[38]309 N.E.2d 833 (Ind. Ct. App. 1974).

tended to exculpate her. The State filed a motion in limine[39] to prohibit defense counsel and witnesses from mentioning the fact that defendant had been privately administered a lie detector test. The supreme court, in *Reid v. State*,[40] earlier held that it was not error to admit, as rebuttal evidence after defendant had testified, the testimony of a polygraph examiner about the results of a test taken by defendant on his own motion and in which he waived all objections. The apparent rule from that case was that polygraph results are admissible if there is a waiver of objection by the person tested.[41]

Judge White could not command the concurrence of the other two judges, but he would have held the results admissible. He discounted the risk that the trier of fact would consider the results infallible. He felt that the risk would be no greater than when experts in other areas are permitted to testify.[42] The real problem he foresaw was that of judging the qualifications of the expert. The General Assembly could solve this problem by providing for licensing and standardization of qualifications for polygraph examiners. Thus, the focus may shift from the question of reliability and prejudice to the issue of the foundation necessary to qualify the examiners.

B. Original Document Rule

Two cases are illustrative of the overlap of the original document rule[43] and the official written statement exception to the hear-

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[39]A motion in limine, made before trial, seeks a protective order to prevent the asking of prejudicial questions or the making of prejudicial statements in the presence of the jury. The proper form of the motion is set forth in Davis, *Motions in Limine*, 15 CLEV.-MAR. L. REV. 255 (1966), *quoted in* Baldwin v. Inter City Contractors Serv., Inc., 297 N.E.2d 831, 834 (Ind. Ct. App. 1973). The motion should include the limitation that the restricted party can make offers to prove outside the hearing of the jury. In *Robinson*, the motion did not contain such a limitation, which led the restricted party (Mrs. Robinson) to believe she could not even make an offer to prove. The State then argued on appeal that, since Mrs. Robinson made no offer to prove, the question could not be raised on appeal. Thus, it can be seen that the motion could be a trap for the unwary.

[40]285 N.E.2d 279 (Ind. 1972), *noted in Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 181-82 (1973).

[41]*See Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 182 (1973) (noting the irrelevance of a waiver if the true basis for excluding polygraph test results is their unreliability).

[42]Judge White cited MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 207, at 504-07 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK].

[43]The original document rule, frequently called the "best evidence" rule, has been defined thus:

[I]n proving the terms of a writing, where the terms are material,

say rule.[44] In *State v. Loehmer*,[45] the State appealed the discharge of a defendant in a prosecution for driving with a suspended license.[46] The trial court sustained the defendant's objection to admission of a "computer printout" of his driving record which showed that his license was suspended at the time of the offense. The defendant argued that the printout was not the "best evidence" and that there was a statutory prohibition against its admission.[47] The trial court ruled that the printout was hearsay.

The court of appeals attempted to unravel the relationship between the Indiana statutes dealing with the driving records of the department of motor vehicles and the statute declaring certified copies of the public records admissible in evidence. Judge Staton, in reversing the trial court, ruled that the same statute provides for both an official written statement exception to the hearsay rule and the certified copy exception to the original document rule. The statute provides that copies of records shall be proved or admitted as legal evidence in any court when the keeper of the records attests that they are true and complete copies and affixes his seal upon

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the original writing must be produced unless it is shown to be unavailable for some reason other than the serious fault of the proponent.

Id. § 230, at 560.

[44]The common law permitted, as an exception to the hearsay rule, written statements made by public officials whose duty was to make such statements with firsthand knowledge of the facts. The declarant's official duty and the availability of the written statements for public inspection added a special badge of truth. The necessity for the use of such statements was found in the inconvenience of requiring public officials to appear in court to authenticate the documents. *See id.* § 315, at 735-36.

[45]304 N.E.2d 835 (Ind. Ct. App. 1973).

[46]*See* IND. CODE § 35-10-1-1 (IND. ANN. STAT. § 9-2305, Burns Repl. 1956); *id.* § 35-1-43-2 (IND. ANN. STAT. § 9-2101); IND. R. APP. P. 15(G). These provisions allow the State to appeal in a criminal case, but the defendant will not be placed in jeopardy again. He may be required to pay costs of the appeal if he loses. The procedure is fraught with constitutional infirmities, the discussion of which is beyond the scope of this Article.

[47]Defendant's assertion of a statutory bar to the introduction of the printout was based upon a limitation contained in the portion of the motor vehicle code which makes one's driving record available to any person, but provides that "[s]uch record shall not be admissible as evidence in any . . . criminal proceding arising out of a motor vehicle accident." IND. CODE § 9-2-1-29 (Burns 1973). Since defendant was prosecuted for driving with a suspended license, and since no motor vehicle accident was involved, the court held the statute inapplicable. Although the opinion does not disclose the nature of the charges which led to the original suspension of Loehmer's license, if the suspension involved an automobile accident, the second charge would, indirectly, have arisen out of the accident. In that situation, the State should not be allowed to introduce the driving record of the defendant in contravention of the directive of the statute.

them.[48] This statute is obviously an exception to the original document rule. Since it is included in the Code among other exceptions to the hearsay rule, and since it provides for both proving and admitting documents, it must also be deemed an official written statement exception to the hearsay rule. Another Indiana statute governing the records of the department of motor vehicles contains a provision that certified copies of driving records are admissible "in a like manner" as originals.[49] Also, Indiana Rule of Trial Procedure 44, although not mentioned by the court, provides for admission of copies of official records attested to by the officer having custody of the record.[50] Thus, the general statute, the specific motor

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[48]IND. CODE § 34-1-17-7 (Burns 1973) provides:

> Exemplifications or copies of records, and records of deeds and other instruments, or of office books or parts thereof, and official bonds which are kept in any public office in this state, shall be proved or admitted as legal evidence in any court or office in this state, by the attestation of the keeper of said records, or books, deeds or other instruments, or official bonds, that the same are true and complete copies of the records, bonds, instruments or books, or parts thereof, in his custody, and the seal of office of said keeper thereto annexed if there be a seal, and if there be no official seal, there shall be attached to such attestation, the certificate of the clerk, and the seal of the circuit or superior court of the proper county where such keeper resides, that such attestation is made by the proper officer.

The subsection uses the words "shall be proved or admitted as legal evidence," which words indicate its dual purpose as both a statutory method of proving, or authenticating, official written documents and of declaring them admissible. In a civil case, Coffey v. Wininger, 296 N.E.2d 154 (Ind. Ct. App. 1973), the court of appeals held that the quoted section is a statutory exception to the hearsay rule.

[49]IND. CODE § 9-1-1-8 (Burns 1973) provides in part:

> (b) The commissioner and such officers of the department as he may designate are hereby authorized to prepare and deliver upon request a certified copy of any record of the department . . . and every such certified copy shall be admissible in any proceeding in any court in like manner as the original thereof.

This statute, unlike *id.* § 34-1-17-7, reprinted at note 48 *supra*, contains no language which declares the certified copy to be admissible in evidence as an official written document exception to the hearsay rule. It merely provides an exception to the original document rule. Thus, to justify statutorily the admission over a hearsay objection, reference to section 34-1-17-7 is necessary.

[50]IND. R. TR. P. 44(A)(1) provides in part:

> An official record kept within the United States, or any state, . . . or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. . . .

Note that Trial Rule 44(A)(1) operates only as an exception to the original document rule and not as an exception to the hearsay rule. It speaks only

vehicle statute, and Trial Rule 44 all provide for admission over a "best evidence" objection.

In *Enlow v. State,*[51] a prosecution for auto banditry, the supreme court found error in the admission of a police officer's oral testimony that the truck involved was registered at the State Bureau of Motor Vehicles as belonging to Enlow. The court noted several well-recognized exceptions to the rule that the original document must normally be produced—one of which is the public records exception.[52] Trial Rule 44 allows not only for proof of official documents by certified copies but also for proof "by any other method authorized by law."[53] The court said that "other method" would include examined copies authenticated by a witness who has personally compared the copies with the original. However, the oral testimony of a police officer was obviously not the original document, not a certified copy, and not an examined copy and, therefore, should have been excluded.

The point to be reiterated is that public records are generally admissible under an exception to the hearsay rule by virtue of Indiana Code section 34-1-17-7. Attested copies are admissible under an exception to the original document rule, which exception is found in section 34-1-17-7 and also in Trial Rule 44. In addition, in some cases, such as *Loehmer,* exceptions may be found in more specific statutes governing the area of law in question.

C. Impeachment

1. Reputation as to Character

The supreme court refused to extend the rule of *Shropshire v. State*[54] to prohibit the introduction of evidence of the disposition of a prior juvenile matter, which evidence was used to impeach on cross-examination a witness called by the defendant as a character witness. In *Lineback v. State,*[55] the court held that, while juvenile matters are not admissible, as are prior convictions, to affect the credibility of the *defendant* as a witness, a defendant who first

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to the manner of proving a document once the document has been determined to be competent evidence.

[51]303 N.E.2d 658 (Ind. 1973).

[52]*Id.* at 661, *citing* McCormick § 240.

[53]Ind. R. Tr. P. 44(C) provides: "This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law."

[54]279 N.E.2d 225 (Ind. 1972), *noted in Evidence, 1973 Survey of Indiana Law,* 7 Ind. L. Rev. 176, 186-87 (1973). *Shropshire* was not mentioned by the court, but the earlier case of Woodley v. State, 227 Ind. 407, 86 N.E.2d 529 (1949), upon which *Shropshire* was based, was cited.

[55]301 N.E.2d 636, *aff'g on rehearing* 296 N.E.2d 788 (Ind. 1973).

places his reputation before the jury through character witnesses opens his entire life to scrutiny in order that the jury may determine whether the witness is, in fact, conversant with the defendant's reputation.[56]

Justice DeBruler questioned the decision in light of the absolute rule of exclusion of juvenile dispositions found in Indiana Code section 31-5-7-15, which provides that the "disposition of a child or any evidence given in the court shall not be admissible as evidence against the child."[57] The court's holding might be justifiable because the purpose of the inquiry was to test the witness' familiarity with the defendant's reputation and to impeach the witness' opinion. Thus, the juvenile record was not technically admitted as direct substantive evidence "against" the defendant. However, the admission of this evidence in *Lineback* does not square with the result reached in *Shropshire*. In *Shropshire*, the supreme court reversed the trial court, which had used the same rationale the court in *Lineback* used to admit the defendant's answers to questions which revealed his juvenile record.

Two other aspects of *Lineback* raise questions not dealt with by the court. First, the prosecutor asked the question, "Did you know that on the 23rd day of March, 1963, he [the appellant] was found to be an incorrigible juvenile?"[58] This question solicited firsthand information from the witness. In the past, the accepted view, ironically enough, required that reputation questions, on both direct and cross-examination, solicit answers based solely on hearsay—"Have you heard . . . ."[59] The Proposed Federal Rules of Evidence allow proof of character to be made by reputation and

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[56]Although not cited by the *Lineback* court, an old Texas case reached the same result in light of a similar juvenile statute. France v. State, 148 Tex. Crim. 341, 187 S.W.2d 80 (1945). More recently, a federal district court, in United States v. Booz, 325 F. Supp. 1280 (E.D. Pa. 1971), held that the prosecution could validly question a reputation witness about a defendant's felony conviction eighteen years earlier. The *Booz* court noted that the leading case, Michelson v. United States, 335 U.S. 469 (1948), allowed questions about two prior convictions which had occurred twenty and twenty-seven years prior to the trial. The trial court in *Booz*, however, instructed the jury that the prior conviction was to be considered only in evaluating the reputation testimony and was not to be used as evidence against the defendant.

[57]IND. CODE § 31-5-7-15 (Burns 1973).

[58]301 N.E.2d at 637.

[59]*See, e.g.*, Michelson v. United States, 335 U.S. 469 (1948).

> Since the whole inquiry . . . is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry, "Have you heard?" has general approval, and "Do you know?" is not allowed.

Id. at 482 (citations omitted). *See also* Wilcox v. United States, 387 F.2d 60 (5th Cir. 1967). *See generally* MCCORMICK § 191.

opinion testimony on both direct and cross-examination.[60] In addition, on cross-examination, specific instances of misconduct may be shown. Although the Proposed Federal Rules do not speak to the exclusion of juvenile matters, their application to the *Lineback* situation would sanction questions by the prosecutor soliciting on cross-examination personal knowledge of specific acts of misconduct.

A safeguard, not mentioned by the *Lineback* court or the Proposed Federal Rules of Evidence, which should be required would be to request the prosecutor, when he seeks to cross-examine a character witness through the use of questions about specific acts of misconduct, to demonstrate to the trial court, out of the hearing of the jury, the actual existence of the specific acts of misconduct in question and their relevancy.[61] This procedure would insulate the jury from unsupported innuendo as a result of questions asked without basis and in bad faith by the prosecutors. This requirement would work no hardship on the State. If the specific act occurred, the prosecution would have the foundation in the record. On the other hand, if the act did not occur, it would be grossly unfair to allow questions based upon nonexistent conduct. If the acts occurred and were used by the prosecutor, a careful instruction to the jury limiting their use as evidence should be required.[62]

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[60]Proposed Fed. R. Evid. 803(21) provides for admissibility, as an exception to the hearsay rule, of evidence of the "reputation of a person's character among his associates or in the community." *Id.* 405(a) provides the method of proof:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

The Advisory Committee's note to rule 405(a) suggests that this rule changes the one announced in Michelson v. United States, 335 U.S. 469 (1948). See note 59 *supra*.

[61]The suggested procedure was approved in Michelson v. United States, 335 U.S. 469, 481 n.18 (1948), "as calculated in practice to hold the inquiry within decent bounds." In United States v. Phillips, 217 F.2d 435, 443-44 (7th Cir. 1954), the court held that the prosecution must demonstrate the existence of the act of misconduct and an instruction must be given by the judge explaining the limited purpose of the cross-examination. The *Phillips* case was cited by the Michigan Supreme Court as authority for requiring the same two safeguards. People v. Dorrikas, 354 Mich. 303, 92 N.W.2d 305 (1958). See McCormick § 192, at 458 & n.81, wherein the author would require a "professional statement" from the prosecutor that he has reason to believe and does believe that the acts in question have occurred.

[62]Once the defendant puts his character in issue, nothing, of course, regardless of all of the above, prevents the state from calling its own witnesses on rebuttal to testify to defendant's bad reputation.

2. *Specific Acts of Misconduct*

In *Dexter v. State*,[63] a unanimous supreme court specifically applied the landmark case of *Ashton v. Anderson*[64] to the impeachment on cross-examination of a defendant in a criminal case. The defendant had chosen to testify and thereby had placed his credibility in issue. At trial, the prosecutor, over objection, was permitted to cross-examine the defendant concerning prior convictions for assault. Since assault does not involve the individual's propensity to tell the truth and is not one of the infamous crimes which, by statute,[65] may be used to impeach a witness, the questions were improper and the case was reversed.[66]

Judge Sharp of the court of appeals, in *Lewis v. State*,[67] took *Ashton* a step further and held that impeachment questions concerning prior convictions, other than those permitted by *Ashton*, are improper even in a case tried to a judge without a jury. This ruling is questionable in light of numerous pronouncements by the Indiana courts that harm arising from evidentiary error is lessened, if not totally annulled, when the trial is to the court.[68]

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[63]297 N.E.2d 817 (Ind. 1973).

[64]279 N.E.2d 210 (Ind. 1972), *noted in Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 187-88 (1973). The court also held that the *Ashton* rule would not be applied retroactively, but since Dexter's case was pending at the time *Ashton* was decided, it should apply to his case.

[65]IND. CODE § 34-1-14-14 (Burns 1973). Infamous crimes include treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, willful neglect, and corrupt perjury.

[66]Evidence of prior crimes would be admissible to establish defendant's intent, motive, purpose, identification, or the presence of a common scheme or plan. Woods v. State, 250 Ind. 132, 235 N.E.2d 479 (1968). There was no attempt in *Dexter* to relate the cross-examination to any of the exceptions noted in *Woods*.

[67]299 N.E.2d 193 (Ind. Ct. App. 1973) (the prosecution questioned the defendant about prior convictions for malicious trespass and joy-riding).

[68]*See* King v. State, 292 N.E.2d 843 (Ind. Ct. App. 1973), *noted in Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 176, 210 (1973), *citing* Shira v. State, 187 Ind. 441, 119 N.E. 833 (1918). The court in *King* stated:

> What might very well constitute prejudicial error in the form of testimony given before a jury does not necessarily constitute prejudicial error in a trial to the court. It must be remembered that a trial judge is presumed to know the intricacies and refinements of the rules of evidence and that he sifts the evidence and weighs it in the light of his legal experience and expertise. He is thus able to separate the wheat from the chaff, ignoring the extraneous and it is only when his judgment has apparently or obviously been infected by erroneously admitted evidence that we will set it aside.

292 N.E.2d at 846.

If a party seeks to use a particular conviction for impeachment, the *Ashton* rationale would necessitate that the trial court, on the application of a party and as a preliminary matter, determine whether the particular conviction was for a crime which reflects on the individual's credibility for truth and veracity. The *Lewis* extension of the *Ashton* rule would mandate a bifurcated proceeding with a different judge for this preliminary determination because, if the trial judge became aware of the convictions at any time prior to judgment, the case would be subject to reversal. The better approach would be to presume that the trial judge is capable of ignoring the legally irrelevant convictions and to set aside his judgment on appeal only when it is obviously affected by the prior convictions.

In *Bryant v. State*,[69] the supreme court held that a collateral matter cannot be made the basis for impeachment. In this prosecution for second degree murder, the State attempted to question the defendant about testimony she had given in a previous prosecution for murder fourteen years earlier. In the present case and in the earlier trial, which resulted in acquittal, she testified to sexual assaults and to continuous drinking by the victims. In cross-examining the defendant, the prosecutor merely asked her if she had previously "testified" about sexual assaults and drinking but did not mention that the previous testimony was given in her former trial. The prosecutor did this even though the trial court, upon defendant's motion, had previously granted a protective order forbidding the mentioning of any facts connected with the previous prosecution.

The supreme court could find no basis for permitting the questioning because, under the *Ashton* rule, only prior convictions may be used to impeach. The statement was also not admissible as a prior inconsistent statement. The court said the testimony was on a "collateral matter"[70] which cannot be made the basis of impeachment. The State attempted to do by innuendo what the law of evidence has always considered to be legally irrelevant, that is, to apprise the jury of the defendant's prior involvement in an incident amazingly similar to the one for which the defendant was being tried.

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[69] 301 N.E.2d 179 (Ind. 1973).

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> The test as to whether the matter is collateral is whether the party seeking to introduce it for purposes of contradiction would be entitled to prove it as a part of his case. It is obvious that the defendant's testimony in the prior trial had no relevance to the guilt or innocence in the latter one.

Id. at 184.

D. Hearsay

1. Self-Serving Declarations

The supreme court aligned itself with the traditional view that statements to others which tend to establish the position of the party-declarant are inadmissible whether made prior or subsequent to the act in question and even though they reflect upon the party's state of mind at the time of the declaration. In *Cain v. State*,[71] the defendant, on trial for second degree murder, called his girl friend to testify to remarks the defendant had made to her both prior and subsequent to the killing, which remarks would tend to show that he had no malicious intent to kill. The trial court sustained the state's objection that the conversations were hearsay and self-serving.

The affirmance of the trial court's exclusion of the defendant's statements to his girl friend was also based on alternative holdings—that the statements were not within an exception to the hearsay rule and that they were self-serving. Defendant had argued that the statements were part of the "res gestae" of the act, but it was clear that the statements made both prior and subsequent to the killing were not engendered by the excitement of the act. Defendant made no argument that they should be admitted as part of the "state of mind" exception to the hearsay rule, but the court, nevertheless, said that statements tending to negative intent are inadmissible.

This latter conclusion, at first glance, appears to mean that self-serving statements should be excluded per se regardless of whether or not they would otherwise be admissible as an exception to the hearsay rule. However, a careful examination of the *Cain* decision tends to narrow the effect of its holding. A case cited by the *Cain* court for the proposition that statements to negative intent are properly excluded as self-serving upheld the exclusion of the defendant's testimony about statements made to a larceny victim.[72]

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[71] 300 N.E.2d 89 (Ind. 1973).

[72] Spittorff v. State, 108 Ind. 171, 8 N.E. 911 (1886). It is significant that in *Spittorff* the defendant, unlike Cain, testified but his declarations tending to establish innocence were excluded nevertheless. *Spittorff* also illustrated the problem courts face in deciding whether a statement is self-serving:

> That he [defendant] manifested a disposition to instigate a prosecution against Gladding [his co-defendant], and professed a willingness to testify to what he had already told a number of persons in relation to the matter . . . did not . . . tend to demonstrate his innocence.

Id. at 173, 8 N.E. at 912. Declarations of this nature were held admissible because they were not self-serving. *See also, e.g.*, Moss v. State, 208 Ark.

The defendant offered to prove that, on the day following the larceny, he went to the house of the victim, urged the victim to institute a prosecution against a co-defendant and urged the victim to call defendant as a witness. In that case, however, similar statements made to other persons had already been testified to by other witnesses. Thus, the defendant was able to make his defense without the excluded statement. Another case, not cited by the court, clearly establishes that if the declarations are part of the "res gestae," they are admissible whether self-serving or not.[73]

A special problem, peculiar to criminal cases, should also be noted. In *Cain,* the defendant could have testified to his intent and would have been subject to cross-examination but instead invoked his constitutional privilege against testifying. The court would not sanction the admission of evidence immune from cross-examination as a result of defendant's own trial strategy. Since the court feared that there would be too great a risk that a defendant would manufacture evidence, it said that it was not forcing the defendant to choose between the right to remain silent and his due process right to present his defense.

The foregoing suggests the narrow rule that in criminal cases in which the defendant chooses not to testify, statements by the accused made to another tending to negative the requisite intent are inadmissible unless there is some independent indicia of their reliability which would make them admissible under a recognized exception to the hearsay rule.[74] The state of mind exception to the hearsay rule, formulated in *Mutual Life Insurance Co. v. Hillmon,*[75]

137, 185 S.W.2d 92, 94 (1945). The defendant, in *Moss,* told a witness shortly after the killing, "I shot that fellow—I had to kill him—he threw something at me." This type of declaration, while containing self-serving aspects, is also an admission against defendant's interest which establishes the indicia of reliability requisite for admission.

[73]In Hiatt v. Trucking, Inc., 122 Ind. App. 411, 415, 103 N.E.2d 915, 917 (1952), a defense witness testified that the defendant driver of one of the cars involved in an accident said, "Why did that man turn in front of me?" The statement, although obviously self-serving, was admitted as part of the "res gestae." Since *Hiatt* was a civil case, the defendant seeking to prove the declaration, unlike Cain, could be called to testify.

[74]This narrow rule would find support from McCormick § 290, at 688; Comment, *Evidence—Hearsay—Exclusion of Self-Serving Declarations,* 61 Mich. L. Rev. 1306, 1318-20 (1963).

[75]145 U.S. 285 (1892). As to this exception, one author states:

> The special assurance of reliability for declarations of present state of mind rests . . . upon their spontaneity and probable sincerity. . . . The special need for use of the declarations does not rest on the unavailability of the declarant—this is not required—but upon the ground that if the declarant were called to testify "his own memory of his state of mind at a former time is no more likely to

is unavailable in the context of the extrapolated *Cain* rule. Whether the court would allow the statements to be admitted into evidence if the defendant took the stand and could be cross-examined remains an open question. Of course, even the validity of the rule that self-serving statements can be admitted into evidence as excited utterances is subject to doubt when the statements are sought to be introduced in a criminal case. Justice DeBruler, who concurred in the *Cain* result but disagreed with the reasoning of the court, asserted that the defendant's statement that he was afraid of the victim was not within the definition of hearsay since no factual occurrences were sought to be established by it. Justice DeBruler also said that the other aspect of the conversation, that defendant had fought with the victim, should have been admitted under the state of mind exception to the hearsay rule.[76]

2. *Reputation as Substantive Evidence*

In *Sumpter v. State*,[77] the supreme court declared unconstitutional the practice of introducing evidence of the reputation of a defendant and the reputation of a "house of ill fame" to prove the fact that the defendant was a prostitute and that the house in question was one of ill fame. The court overruled two old Indiana cases[78] which had recognized reputation testimony in such cases as an exception to the hearsay rule. The court could not find the indicia of reliability necessary to prevent hearsay testimony from violating the confrontation clauses of the United States and Indiana Constitutions. Since the gist of the offense was visiting or living in a house where prostitution had actually occurred, the reputation of the house or defendant was irrelevant. Given that ground

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be clear and true than a bystander's recollection of what he then said."

McCormick § 294, at 695 (footnotes omitted), *quoting from Hillmon*, 145 U.S. at 295.

[76]300 N.E.2d at 94 (DeBruler, J., concurring). Justice DeBruler also quoted the McCormick treatise in support of his view that there should be no per se rule excluding self-serving declarations:

> The notion that a party's out-of-court declarations could not be evidence in his favor because of their "self-serving" nature seems to have originated as an accompaniment of the now universally discarded rule forbidding parties to testify. When this rule of disqualification for interest was abrogated by a statute, any sweeping rule of inadmissibility regarding "self-serving" declarations should have been regarded as abolished by implication.

McCormick § 290, at 688.

[77]306 N.E.2d 95 (Ind. 1974).

[78]Schultz v. State, 200 Ind. 1, 161 N.E. 5 (1928); Betts v. State, 93 Ind. 375 (1883). The latter case held that particular acts of prostitution need not be proved.

for exclusion, it is not readily apparent why the court determined that the use of reputation testimony was *constitutionally* impermissible. Other courts have excluded the same type of reputation testimony on nonconstitutional grounds.[79]

3. Admissions of a Party

In *Robinson v. State*,[80] the defendant was accused of the murder of her fifteen month old son. The main issue in the case was whether the killing was accidental or intentional. Firemen responded to a call for first aid at the house of the defendant's mother. After the firemen placed the boy in the ambulance, one of them returned to the house to pick up his gloves and a first-aid kit. At trial, the fireman testified that he heard voices from another room. One voice, which he identified as that of the defendant's mother, said, "You shouldn't have thrown the baby against the wall. You were beating him too hard."[81] The voice he identified as the defendant's answered, "Shut up."[82]

Defendant contended that the fireman's testimony was hearsay; the State justified it as an "admission against interest."[83] The court stated the rule that, when a criminal accusation is made in the presence of the person accused, the person's silence or failure to contradict or explain the statement may be proved as an admission. The circumstances must be such as to afford him an opportunity to speak and such as would naturally call for some action or reply from persons similarly situated.[84] Since the most important element of this rule is the accused's failure to deny, an equivocal response may be used as an admission.

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[79]*See, e.g.*, People v. Flagg, 18 Ill. App. 2d 548, 153 N.E.2d 116 (1958); Commonwealth v. Mahramus, 211 Pa. Super. 376, 263 A.2d 572 (1967).

[80]309 N.E.2d 833 (Ind. Ct. App. 1974). See also text accompanying notes 38-42 *supra*.

[81]309 N.E.2d at 837.

[82]*Id.*

[83]The proper characterization is simply "admission." The court was confusing "declarations against interests" with party admissions. The distinction between these two exceptions to the hearsay rule is explained in *Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 192 n.78 (1973).

[84]The *Robinson* court took this rule from Diamond v. State, 195 Ind. 285, 291, 144 N.E. 466, 468 (1924). McCormick states this hearsay exception as follows:

> If a statement is made by another person in the presence of a party to the action, containing assertions of facts which, if untrue, the party would under all circumstances naturally be expected to deny, his failure to speak has traditionally been receivable against him as an admission.

MCCORMICK § 270, at 651-52, *citing* 4 J. WIGMORE, EVIDENCE § 1071 (Chadbourn rev. 1972) [hereinafter cited as WIGMORE].

Defendant argued that the term "shut-up" was a denial.[85] The court found the term susceptible of more than one meaning, thus rendering both the accusation and the reply admissible. The court recognized the danger involved in allowing a jury to hear evidence of a hearsay accusation and an equivocal reply as opposed to merely a defendant's reply, since the accusation may convince the jury that the defendant is guilty even when the jurors understand the reply as a denial. A proper instruction not to consider an accusation as evidence of the facts stated therein would lessen this danger.

E. Sufficiency of the Evidence

1. Corroboration of Confessions

The Indiana Court of Appeals for the Second District, in *Green v. State*,[86] an appeal from a conviction for assault and battery with intent to kill, split sharply over the quantum of independent corroborative evidence, in addition to an extrajudicial admission, necessary to establish the existence of the corpus delicti of a crime. The rather bizarre factual pattern of this case must necessarily be set forth in some detail since the sufficiency of the evidence was the only question presented to the court. The defendant, Johnny Green, was arrested at a department store for shoplifting. When Green escaped the police officer's grasp, the officer notified another policeman, Officer Cambridge, and gave him a description of Green. Cambridge spotted Green stopping a car on a nearby street. Cambridge yelled for Green to stop, but Green entered the car anyway. As Officer Cambridge circled in front of the car, it lunged forward three or four feet and, in so doing, injured Cambridge slightly. There was then a scuffle over the possession of the car keys between the innocent driver of the car and Green. The driver managed to keep control of the keys and to escape from the vehicle.

At trial, Officer Cambridge testified to the above and also, without objection, to the following statement made by the defendant at the jail:

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[85]In her brief, defendant used the following example to support her contention:

> [W]hen one school boy calls another a "sissy," the boy blurts out "Shut-up." He obviously does not mean to imply an admission that he is in fact a sissy. He is saying in effect, "I am not and don't say that I am."

309 N.E. at 841.

[86]304 N.E.2d 845 (Ind. Ct. App. 1973). For a discussion of the requirement of corroboration, see McCORMICK § 158, at 346-49; *Developments in the Law—Confessions*, 79 HARV. L. REV. 938, 1072-84 (1966); Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U. PA. L. REV. 638 (1955).

> Mr. Green related to me at the time he was sorry he had tried to run over me with the car, he wanted a quick and speedy trial, he wanted to get it out of the way and start pulling his time as soon as he could.[87]

In his testimony, the defendant denied the apology and said that he had told Officer Cambridge that it was the innocent driver who caused the car to lunge forward, and that he, Green, had pressed the brake. He also testified that he saw Cambridge in front of the car but that his only intention was to get away.

The majority postulated some basic general rules applicable to the case. First, a conviction may not rest solely upon a confession of guilt[88] and, secondly, to protect against convicting a man by his testimony alone, a confession is not admissible unless there is independent proof of the corpus delicti. Although, in *Green*, the majority was confronted with an admission as opposed to a confession, the court treated the admission as if it were a full confession.[89]

The court stated that the corpus delicti consists of three elements: (1) the occurrence of a specific injury or loss, (2) a criminal, as opposed to an accidental, cause, and (3) the identity of the accused as the perpetrator of the crime.[90] Independent evidence of only the first two elements is needed to make a confession admissible; to require that the third element be proved would be absurd, because it would require proving the whole crime and would make the admission of a confession superfluous. The majority and the dissent disagreed on whether the State must introduce independent evidence of both the existence of injury and the fact that the injury resulted from a criminal act. Both, however, agreed that the State, in order to admit a confession, need not establish the corpus delicti beyond a reasonable doubt. The majority cited two cases which establish that there must be independent evidence of both elements,[91] but the court's holding apparently requires only indepen-

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[87] 304 N.E.2d at 847.

[88] *Id.* at 848.

[89]

> A confession is the admission of guilt by the defendant of all the necessary elements of the crime of which he is charged, including the necessary acts and intent. An admission merely admits some fact which connects or tends to connect the defendant with the offense but not with all the elements of the crime.

Id., *quoting from* State v. Masato Karumai, 101 Utah 592, 596, 126 P.2d 1047, 1052 (1942). The dissent likewise found the distinction immaterial in this case. 304 N.E.2d at 854.

[90] 304 N.E.2d at 849-50, *citing* WIGMORE § 2072, at 401.

[91] Both Watts v. State, 229 Ind. 80, 101, 95 N.E.2d 570, 579 (1950), and Parker v. State, 228 Ind. 1, 7, 88 N.E.2d 556, 558 (1949), required "evidence of probative value," aside from the admission or confession to prove that the crime charged was committed. The courts stated that there must also be some

dent evidence on any one element of the corpus delicti. The majority found that Green's confession, with the other testimony of Officer Cambridge, established guilt beyond a reasonable doubt. Since Green did not object to the introduction of the confession, the majority did not consider the issue of whether it would have been admissible if properly objected to.

Judge White, in dissent, reasoned that the issue of the quantum of independent evidence necessary to support the use of the admission was not waived by Green's failure to object. Judge White recognized that, while this question would often arise at the time the admission or confession was offered, the issue was still properly before the court because it was considering the sufficiency of the evidence to support a conviction.[92] In any case, Judge White felt the conviction so fundamentally erroneous that he would have decided the issue sua sponte. If Green's admission were eliminated from the evidence, there was some evidence showing injury but no evidence that someone was criminally responsible for the injury. In short, Judge White found nothing except Green's extrajudicial admission from which it could be inferred that the forward lunge of the car was other than accidental.

The dissent points out that the statement by Officer Cambridge, that the innocent driver, Harris, reapplied the brakes after the car lunged, was based on a declaration made by Harris after the incident and in Green's presence. Thus, the statement was admissible as an implied admission through silence, since Green did not unequivocally deny that Harris had applied the brakes.[93] This serves as more evidence that the act was criminal and, also, as the majority noted, serves as evidence of Green's guilt since the driver, Harris, was not a suspect. Despite the voluminous quotations from earlier cases by both the majority and the dissent, *Green* manifests no disagreement concerning the applicable rules of law. The question of whether there was sufficient evidence on the second element of the corpus delicti was a question of fact. It seems obvious that the testimony that the innocent driver reapplied the brakes, Green's statement that he merely intended to get away, and the

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independent evidence tending to prove that the crime charged has been committed by someone before the admission or confession is admissible.

[92]304 N.E.2d at 856 (White, J., dissenting), *citing* Parker v. State, 228 Ind. 1, 12, 88 N.E.2d 556, 559 (1949).

[93]That Harris reapplied the brake is something Officer Cambridge could not have known from firsthand knowledge. When defendant's attorney learned that Cambridge's conclusion was based on a conversation with Harris in Green's presence, defendant's attorney made no attempt to learn whether defendant's reaction was a denial of admission and made no objection to the testimony. For the requirements for the admissibility of an implied admission, see note 84 *supra*.

circumstantial fact that Green was fleeing a police officer at the time would be some evidence on the second element despite the dissent's statement that there was no independent evidence on this point.

2. *Standard of Proof*

In *Ringham v. State*,[94] the supreme court split on the question of the standard of proof required in criminal cases based upon circumstantial evidence. In an appeal from a conviction of second degree murder, the majority affirmed the trial court's use of an instruction which stated that, while every material element of the crime charged must be proved beyond a reasonable doubt, it is "not necessary that all incidental or subsidiary facts should be proved beyond a reasonable doubt."[95] A similar charge using the term "subsidiary evidence" was disapproved in an earlier Indiana case,[96] which the dissent felt to be controlling. The majority, however, said that the evidence in its entirety must be weighed and considered to determine whether every material element of the crime charged has been proved beyond a reasonable doubt. The decision seems in line with other cases lowering the standard of proof on some elements such as the voluntariness of a confession[97] and the establishment of the corpus delicti for purposes of admitting a confession or admission.[98]

3. *Circumstantial Evidence*

A number of recent decisions, dealing with the scope of appellate review of convictions based solely on circumstantial evidence, reached conflicting results.[99] Only two illustrative cases will be mentioned here. The stricter view was espoused in *Carpenter v. State*[100] in which the court held that, to be sufficient to sustain a conviction, circumstantial evidence must exclude every reasonable hypothesis of innocence.[101] In other words, an appellate court is

[94]308 N.E.2d 863 (Ind. 1974).

[95]*Id.* at 866.

[96]White v. State, 234 Ind. 209, 125 N.E.2d 705 (1955).

[97]Lego v. Twomey, 404 U.S. 477 (1972); Ramirez v. State, 286 N.E.2d 219 (Ind. Ct. App. 1972), *noted in* Kerr, *Criminal Procedure, 1973 Survey of Indiana Law*, 7 IND. L. REV. 128 (1973).

[98]Green v. State, 304 N.E.2d 845 (Ind. Ct. App. 1973). See text accompanying notes 86-93 *supra*.

[99]The cases have been surveyed and the problem discussed in Note, *Appellate Review of Circumstantial Evidence in Indiana Criminal Cases*, 7 IND. L. REV. 883 (1974).

[100]307 N.E.2d 109 (Ind. Ct. App. 1974) (first district).

[101]This rule was mandated by Manlove v. State, 250 Ind. 70, 232 N.E.2d

free to review the evidence and, even though it might support the trier of fact's conclusion, the evidence is insufficient, and the conviction should be reversed, if the evidence is also consistent with a theory of innocence.[102] The other view, enunciated in *Atkins v. State*,[103] is that the reviewing court looks at the evidence only to determine if the trier of fact could have reasonably drawn therefrom an inference of guilt. Even though inferences of innocence could have been drawn as well, the court will not set aside the inference of guilt.

The two tests are obviously not merely semantical differences. One author has noted that, of twenty cases applying the less strict standard of review, only eight would have been affirmed under the more strict reasonable hypothesis of innocence test.[104] The author recommends the reasonable hypothesis of innocence test because, since the testimonial evidence does not directly establish guilt, the reviewing court is just as capable of determining the inferences to be drawn as is the trier of fact.[105] In reviewing the sufficiency of the evidence, the court should determine whether there is any evidence to support the conviction. If there is not, it need go no further to reverse. If, however, there is some circumstantial evidence, the court should accept the testimonial evidence most favorable to the State. If the circumstantial evidence supports a reasonable inference of innocence, as well as of guilt, the conviction should be reversed.[106]

F. Expert Testimony

The Indiana Court of Appeals for the First District, in *Henderson v. State*,[107] extended the holding of *Smith v. State*[108] to allow

874 (1968), and was followed in Banks v. State, 257 Ind. 530, 276 N.E.2d 155 (1971).

[102]Wilson v. State, 304 N.E.2d 824 (Ind. Ct. App. 1973), is illustrative of the application of the reasonable hypothesis of innocence test. The court reversed a conviction for theft of an automobile after reviewing the following facts. Defendant Wilson was involved in an accident while driving an automobile stolen by another person, Harlson, who was a friend of the true owner. Wilson lied at the scene and said that he was not driving the car and that Harlson was. This circumstantial evidence would not support the conviction because the court noted that Wilson had no driver's license in his possession and could have lied out of fear of arrest for that.

[103]307 N.E.2d 73 (Ind. Ct. App. 1974) (third district).

[104]Note, *Appellate Review of Circumstantial Evidence in Indiana Criminal Cases*, 7 IND. L. REV. 883, 892 (1974).

[105]*Id.* at 898.

[106]*Id.* at 899.

[107]308 N.E.2d 710 (Ind. Ct. App. 1974).

[108]285 N.E.2d 275 (Ind. 1972), *noted in Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 203 (1973).

an expert witness, testifying as to the defendant's insanity, to testify also as to information which he learned from an interview with the defendant's family. In *Henderson*, the trial court refused to let a defense expert, a psychologist, testify as to what he learned as the result of an interview with the family of the defendant. The court of appeals reversed. The appellate court cited the *Smith* case which allowed an expert to give his opinion concerning the defendant's sanity based in part on hospital records containing information supplied by persons not available for cross-examination. The hospital reports were admitted into evidence, not as evidence of the truth of the matters asserted therein, but only to give the jury an opportunity to consider, in evaluating the expert's credibility, the bases of the expert's opinion. An instruction limiting the use of the records was required.

The *Smith* case, which itself changed previous Indiana law allowing an expert to give an opinion based on information in evidence or in response to hypothetical questions, contained this express limitation: "The types of records and reports which can be utilized should only be those produced by qualified personnel and the type which an expert customarily relies on."[109] Clearly the information relied upon in *Henderson* was not produced by qualified personnel. The test for admission of this hearsay should be the same as for other types of hearsay. There must be both a sufficient indicia of reliability[110] and a necessity for the use of the hearsay.

The necessity for the use of the statements in *Henderson* was wholly absent. The defendant's family could easily have been placed on the stand to relate the same information they told to the expert. The expert psychologist could then have testified on the basis of that information. This situation is in contrast to the need to use hospital records which may have been compiled over a period of years by many different staff members and doctors. Medical personnel are reluctant to spend time in the courtroom and, in recognition of the hardship of requiring each doctor to attend, the *Smith* case recognized the necessity for the use of hospital records. While it may be wise to admit underlying information used by an

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[109] 285 N.E.2d at 276, *citing* United States v. Bohle, 445 F.2d 54 (7th Cir. 1971). *See* Richardson v. Perales, 405 U.S. 389 (1971) (admissibility of written medical reports in Social Security disability determination hearing upheld). *See also* White v. Zuell, 263 F.2d 613 (2d Cir. 1959); Long v. United States, 59 F.2d 602 (4th Cir. 1932).

[110] *Cf.* United States v. Bohle, 445 F.2d 54 (7th Cir. 1971) (hospital records used by an expert, which records contained statements made by the defendant's mother, were admissible).

expert in forming his opinion, the courts should not do so absent the reasons delineated in *Smith* for allowing hospital records.

G. Privilege—Plea Bargaining

In *Webster v. State*,[111] the supreme court stated that the admission of evidence of plea bargaining between the attorney for the defendant's accomplice and the prosecuting attorney was not a violation of the attorney-client privilege. The defendant attempted to elicit information about these plea negotiations in order to impeach the accomplice by showing that his testimony resulted from promises of leniency. The information defendant sought was not a conversation between an attorney and his client but one between the attorney and a third party.

This decision appears to limit *Hineman v. State*,[112] in which the court held that any communication or evidence relating to plea bargaining negotiations is privileged, and thus inadmissible, unless the defendant subsequently enters a plea of guilty which is not withdrawn.[113] The *Hineman* case extended an earlier ruling of the court of appeals[114] to include testimony about plea negotiations by the defendant as well as by the State. According to *Webster*, however, plea negotiations can properly be utilized for the limited purpose of impeaching a witness.[115]

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[111]302 N.E.2d 763 (Ind. 1973).

[112]292 N.E.2d 618 (Ind. Ct. App. 1973).

[113]*Id.* at 623.

[114]Moulder v. State, 289 N.E.2d 522 (Ind. Ct. App. 1972), *noted in Evidence, 1973 Survey of Indiana Law*, 7 IND. L. REV. 205 (1973).

[115]This is consistent with ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 3.4 (Approved Draft 1968), which the court in *Hineman* adopted. This sections provides in part:

> [T]he fact that defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

Note that the section refers only to negotiations by the defendant. Note also that the negotiations should not be received as evidence against or in favor of the defendant. In *Webster*, the offer was not evidence "for" or "against" either party, but was merely impeachment evidence.

The Proposed Federal Rules of Evidence would exclude the use of the plea negotiation only if offered *against* the defendant. Clearly, its use for impeachment, as in *Webster*, is permitted. *See* Proposed Fed. R. Evid. 410. The Advisory Committee's note points out that "use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster."

H. Judicial Notice

A most unusual procedure for establishing the physical characteristics of the defendant, which characteristics are necessary elements of a crime, was formulated in *Sumpter v. State.*[116] The defendant was convicted at trial for living in a house of ill fame. The defendant did not take the stand and there was no testimony concerning her sex. The court of appeals reversed,[117] holding that the prosecution failed to prove that defendant was a female, a required element of the crime charged. On petition to transfer, the supreme court modified prior law by holding that, when an individual is charged with an offense, an element of which is the sex of the accused, the presiding judge may take judicial notice of the defendant's sex. The judge's finding is not necessarily conclusive; once the judge takes judicial notice of the defendant's sex, a rebuttable presumption arises sufficient to constitute a prima facie case in favor of the State.[118]

Justice DeBruler, dissenting, found the majority's procedure unnecessary and an infringement on the defendant's right to have all the elements of the crime proved beyond a reasonable doubt. The procedure was unnecessary because it would have been a simple matter for the State to call a lay witness, for example, a female police officer, to state her belief as to defendant's sex. Justice DeBruler also felt that the court should be extremely reluctant to create a presumption, on an element of a crime defined by the legislature, which had the effect of carrying the State's case to the jury.

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[116]306 N.E.2d 95 (Ind. 1974), *modifying on petition to transfer* 296 N.E.2d 131 (Ind. Ct. App. 1973). For a discussion of the use of reputation testimony to prove the offense of living in a house of ill fame, see notes 78-80 *supra* and accompanying text.

[117]Sumpter v. State, 296 N.E.2d 131 (Ind. Ct. App. 1973). The court of appeals relied on a case which had held that, when age is a required element of a crime, the record must reflect the defendant's age and neither the jury nor the court is free to form an opinion by observing the defendant sitting in the court room. If the defendant takes the stand, the jury is then free to observe his demeanor and other characteristics to arrive at some conclusion about his age. *See* Watson v. State, 236 Ind. 329, 140 N.E.2d 109 (1957). The reason for this rule is to prohibit the jury from considering any material not properly introduced into evidence. "To let the bars down and turn the jury loose to seek its own information where it cares to find it, would open a Pandora's box of innumerable injustices in verdicts rendered." *Id.* at 337, 140 N.E.2d at 112. The court of appeals distinguished Howard v. State, 257 Ind. 166, 272 N.E.2d 870 (1971), also involving a conviction for living in a house of ill fame, because in that case a police woman testified that she had seen the defendant partially undressed and that she believed that the defendant was a female.

[118]306 N.E.2d at 99.

This was especially true of the offense in question, the "most fundamental element" of which was the sex of the defendant.

Even though the supreme court sanctioned judicial notice of a defendant's sex, it is still safer for the State to put a witness on the stand and elicit from the witness an opinion as to a defendant's sex. This would alleviate any defendant's contention that she did not know that the court had taken judicial notice of her sex and would prevent appeals over the procedural burden facing the defendant in such cases. In any event, if the trial court takes judicial notice of the defendant's sex, it should place such notice on the record. If the court does not do so on its own motion, the prosecuting attorney should request the court to put such notice on the record.

X. Insurance

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This Note reviews the most significant insurance cases decided by the Indiana courts within the past year. For the most part, the issues presented involved construction of policy language and legislative intent. It is sufficient to note that the courts were not ambivalent in exercising their judgment in this area of law. As the following cases indicate, the element of reasonableness was given a rather high priority when consumer expectations conflicted with prolix policy language.

A. Fraudulent Misrepresentation of Insuring Agreement

One interesting case decided this past year by the Indiana Court of Appeals should serve as a caveat to the insurance industry to deal in good faith with its insureds. In *Physicians Mutual Insurance Co. v. Savage*,[1] the court of appeals held that misrepresentations by an insurer's agent can support a specific finding of fraud. This finding justified an award of substantial exemplary damages in an action on the contract. In this case, the executor of the insured's estate notified the insurance company of the insured's death and requested claim and proof of death forms. The insured had been fatally injured while operating an automobile and a blood test taken

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[1]296 N.E.2d 165 (Ind. Ct. App. 1973).