or suffering or if the parent is failing to supply the necessary services to a minor.[148]

VIII. Criminal Law and Procedure

*William A. Kerr**

Three years have now elapsed since the Indiana Court of Appeals acquired jurisdiction to hear criminal appeals and began issuing opinions in criminal cases. The court of appeals filed approximately the same number of opinions during each of the first two years (approximately 195 in the first year and 190 in the second year) but increased this number by a substantial margin during the third year by filing approximately 265 opinions from June 1, 1974, to May 31, 1975. During the same three year period, the Indiana Supreme Court filed approximately 140 opinions during the first year, 100 opinions during the second year, and 101 opinions from June 1, 1974, to May 31, 1975. Criminal cases thus continue to constitute a major portion of the workload handled by both the supreme court and the court of appeals, and the number of such cases makes it essential for this survey to be somewhat selective in nature. The opinions that are included in this survey are discussed in the general order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pretrial issues and continuing with issues pertaining to the trial and post-trial stages. One opinion of the Indiana Supreme Court is considered first, however, because of its significance for criminal law and procedure in general.

During the 1973 session of the Indiana General Assembly, a portion of the proposed Indiana Code of Criminal Procedure prepared by the Indiana Criminal Law Study Commission was enacted into law.[1] Thereafter, the Indiana Supreme Court concluded that these new rules of procedure were in effect and would continue in effect unless the court decided to promulgate rules designed to supersede the ones enacted by the General Assembly or unless any particular provision enacted by the legislature conflicted with a

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[148] RESTATEMENT OF RESTITUTION §§ 113, 114 (1937).

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[1] *See* Kerr, *Criminal Law and Procedure, 1974 Survey of Indiana Law*, 8 IND. L. REV. 137 n.1 (1974) [hereinafter cited as *1974 Survey of Indiana Law*].

"specific existing rule of this Court."[2] Although this opinion helped to clarify the controversy concerning the validity of the new rules, the issue was not fully resolved because the court did not define what was meant by a "specific existing rule of this Court." Thus the opinion could be interpreted as referring to the specific code or collection of Indiana rules of criminal procedure, specific rules announced formally from time to time by the court in various opinions, or rules of procedure that can be gleaned from the actions of the court taken in the various cases that are decided by it. A decision of the court during this past year, *Richard v. State*,[3] suggests the last interpretation, but the court did not discuss the implications of its decision in this regard.

In the *Richard* case, the defendant contended that he was denied a fair trial because the jury was not permitted to view the scene of the offense. On appeal he argued that the statute[4] which permitted such a view only in the discretion of the trial court and with the consent of all the parties was invalid because it encroached upon the rule-making authority of the courts. The Indiana Supreme Court agreed that the statute was questionable, observed that the court had previously questioned the validity of the statute, but concluded, "By acquiescence in its proscriptions, we have impliedly adopted it as a trial rule."[5] The court then held that the defendant had not been denied a fair trial, and it again observed, "Although we have declared that the rule was illegitimately begotten, we have thus far recognized it as our own."[6] This opinion thus suggests that it may not always be an easy matter to determine when a legislatively enacted rule of procedure is in fact valid since the rule may be in conflict with a prior decision of the supreme court which impliedly adopted a "specific" rule of procedure. The opinion also suggests the interesting possibility that the legislature, having adopted a rule of procedure, may not thereafter be able to repeal such a statutory procedure since the supreme court may have "impliedly" adopted the statutory procedure in the interim. Whatever the outcome may be, the *Richard* case suggests that a careful study must be made of the Indiana Supreme Court opinions before the validity of any of the individual provisions of the newly enacted procedural code can be determined.

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[2]Neely v. State, 305 N.E.2d 434, 435 (Ind. 1974).

[3]319 N.E.2d 118 (Ind. 1974).

[4]IND. CODE § 35-1-37-3 (Burns 1975).

[5]319 N.E.2d at 119.

[6]*Id.* at 120.

A. Search and Seizure

1. Necessity for Arrest Warrants

Although the issues are not fully explored, the First District Court of Appeals clearly held in *Kendrick v. State*[7] that an officer may make an arrest without a warrant for a felony if the officer has probable cause to make the arrest. The defendant argued that his arrest was invalid because it was made without a warrant, but the court of appeals upheld the validity of the arrest because probable cause for the arrest was sufficiently established. The court thus restated the traditional view but unfortunately did not discuss the line of Indiana cases that suggest that an arrest warrant is required if it is practicable for a warrant to be obtained.[8]

The court of appeals did not refer to the recent decision of the Indiana Supreme Court in *Garr v. State*,[9] but that decision also reached the same conclusion without discussing the contrary line of cases. Although the contrary line of cases does exist in Indiana, the view expressed in the *Kendrick* and *Garr* cases now appears to have the support of the United States Supreme Court. That Court stated in its recent opinion in *Gerstein v. Pugh*[10] that it had expressed a preference for the use of arrest warrants when feasible but had "never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant."[11] In fact, the Court added the observation that a requirement that an officer obtain a warrant prior to any arrest "would constitute an intolerable handicap for legitimate law enforcement."[12]

2. Search Warrants

Prior to 1969, probable cause for the issuance of a search warrant could not be based upon hearsay but had to be established by facts personally known to the person filing the affidavit to obtain a search warrant.[13] In 1969, the Indiana legislature changed this requirement by providing that probable cause for a search warrant may be established by hearsay so long as the hearsay is

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[7]325 N.E.2d 464 (Ind. Ct. App. 1975).

[8]Stuck v. State, 225 Ind. 350, 264 N.E.2d 611 (1970); Throop v. State, 254 Ind. 342, 259 N.E.2d 875 (1970); Bryant v. State, 299 N.E.2d 200 (Ind. Ct. App. 1973); Johnson v. State, 299 N.E.2d 194 (Ind. Ct. App. 1973). For a discussion of these cases see *1974 Survey of Indiana Law* 138-42.

[9]312 N.E.2d 70 (Ind. 1974).

[10]420 U.S. 103 (1975).

[11]*Id.* at 113 (citations omitted).

[12]*Id.*

[13]McCurry v. State, 249 Ind. 191, 231 N.E.2d 227 (1967); Rohlfing v. State, 227 Ind. 619, 88 N.E.2d 148 (1949).

reliable information supplied by a credible person.[14] In order to insure that the hearsay would be reliable, the legislature included a provision in the statute requiring the affiant to state in the affidavit that the information was received from a credible person who "spoke with personal knowledge of the matters contained therein" and to include in the affidavit a statement of the "facts within the personal knowledge of the credible person."[15]

Shortly after this statute was enacted, the Indiana Supreme Court discussed its effect in dicta in *Ferry v. State*.[16] The *Ferry* case involved a search warrant that was obtained prior to the 1969 statute, and the warrant was found to be invalid because it was obtained on the basis of hearsay information. The information had been transmitted from police officers in Clinton, Iowa, to police officers in Louisville, Kentucky, and then to a police officer in Clarksville, Indiana, who filed the affidavit for the search warrant. Although the court based its holding on decisions prior to the 1969 statute, the court also observed that the warrant would have been invalid even under the new statute because the information was based on multiple or "totempole" hearsay and the affidavit did not state the facts known personally to the Iowa officer or the reasons why the Indiana officer believed the Iowa officer.[17]

The dictum in the *Ferry* case was followed during the past year by the Indiana Supreme Court in *Madden v. State*.[18] In a 3-2 decision, the court accepted the view that multiple or "totempole" hearsay cannot be relied upon to obtain a search warrant under the 1969 statute. In the *Madden* case, the defendant was convicted of second degree murder on the basis of evidence obtained under a search warrant. The affidavit for the warrant was found to be invalid because it stated that certain information was reported by an unnamed person to the Greensburg City Police Department and then to the affiant who was a detective with the Indiana State Police.[19] The court also noted that the affidavit generally failed to state the facts within the personal knowledge of the informers involved or the reasons why the affiant believed the informers. In so doing, the court emphasized that it would construe the statute strictly to insure that the reliability and credibility of hearsay would be determined by the magistrate called upon to

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[14]IND. CODE § 35-1-6-2 (Burns 1975).

[15]*Id.*

[16]255 Ind. 27, 262 N.E.2d 523 (1970).

[17]*Id.* at 31-34, 262 N.E.2d at 527-28.

[18]328 N.E.2d 727 (Ind. 1975).

[19]The Indiana statute, as thus interpreted, places stricter limits on the use of hearsay than required by the United States Supreme Court which would permit the use of hearsay, even multiple or "totempole" hearsay, so long as it is shown to be reliable and credible.

issue a search warrant rather than by the affiant seeking to obtain the warrant.

The reliability of hearsay was also considered by the First District Court of Appeals in upholding the validity of a search warrant in *Mills v. State*.[20] In that case, the affidavit concluded with the statement that the "informant also furnished information to this affiant in the past that resulted in at least four (4) narcotics arrests and seizures of narcotics drugs."[21] The defendant argued that this allegation was not sufficient to establish reliability since convictions did not result from the information furnished to the affiant, but the court concluded that reliability was shown by the fact that narcotics were seized. The court thus held that it is not necessary for the affidavit to allege that convictions resulted from information provided by an informer. In fact, the court observed that reliability can be shown by a statement in the affidavit that the informant had previously supplied valid information.[22]

The First District Court of Appeals also held in *Hopkins v. State*[23] that a search warrant need not contain a statement of the facts establishing probable cause for the warrant provided that the affidavit showing probable cause is attached to the warrant and that reference is made to it in the warrant. The statute providing for search warrants[24] sets forth an example of a warrant which suggests that the probable cause affidavit is to be copied verbatim into the body of the warrant, and the *Hopkins* decision thus indicates that this is only a suggested form and is not mandatory.[25]

3. Execution of Search Warrants

According to both the Indiana Constitution[26] and the Federal Constitution,[27] a search warrant must describe the items to be seized with particularity. The United States Supreme Court has held that this requirement "prevents the seizure of one thing under a warrant describing another" and emphasized that "nothing is left to the discretion of the officer executing the warrant."[28] In *Hopkins v. State*,[29] officers seized two pairs of shoes while search-

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[20]325 N.E.2d 472 (Ind. Ct. App. 1975).

[21]*Id.* at 474.

[22]*Id. See* Foxall v. State, 298 N.E.2d 470, 473-74 (Ind. Ct. App. 1973), *noted in 1974 Survey of Indiana Law* 143.

[23]323 N.E.2d 232 (Ind. Ct. App. 1975).

[24]IND. CODE § 35-1-6-3 (Burns 1975).

[25]*See also* McAllister v. State, 306 N.E.2d 395 (Ind. Ct. App. 1974).

[26]IND. CONST. art. 1, § 11.

[27]U.S. CONST. amend. IV.

[28]Marron v. United States, 275 U.S. 192, 196 (1927).

[29]323 N.E.2d 232 (Ind. Ct. App. 1975).

ing the defendant's apartment although the search warrant that they were executing described only one pair of shoes. The First District Court of Appeals held that the seizure was lawful despite the defendant's argument that the officers had no discretion under the warrant to seize the second pair of shoes. Relying upon *Hall v. State*,[30] an earlier decision of the Indiana Supreme Court, the First District Court of Appeals stated that "if in the course of a search the police discover items not named in the warrant which might have been seized in a search incident to an arrest, then those items may also be seized, pursuant to the search warrant."[31] The rule as stated by the court of appeals, however, is broader than the holding in the *Hall* case. The supreme court stated the rule in that case as follows:

> Where, as here, officers conduct a search pursuant to a valid search warrant in [a] search for specifically named fruits of a crime, we hold that all fruits of that specific crime found in the search whether named in the search warrant or not are admissible in evidence.[32]

In reaching this conclusion, the supreme court relied upon a decision of the United States District Court for the Northern District of Indiana which did adopt the broader rule,[33] but the supreme court's statement suggested that an officer might not be permitted to seize anything not described in a warrant except those items specifically related to the offense for which the warrant was issued. The decision of the First District Court of Appeals in *Hopkins* now suggests that the broader rule should be followed so that an officer can seize any items found in a search, whether related to the particular offense for which the warrant was issued or to any other offense.

The First District Court of Appeals also issued another important opinion during the past year concerning the execution of search warrants. In *State v. Porter*,[34] police officers went to a certain house and, with the aid of binoculars, observed the defendant processing marijuana in another house nearby. The officers then obtained a search warrant, entered the house where the defendant was processing the marijuana, and seized the marijuana. Thereafter, the prosecutor conceded that the search warrant was invalid but attempted to sustain the seizure by relying on the "plain view" doctrine. The court of appeals first observed that the seizure could not be justified on the basis of the "plain view" doctrine

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[30]255 Ind. 606, 266 N.E.2d 16 (1971).

[31]323 N.E.2d at 236.

[32]255 Ind. at 610, 266 N.E.2d at 18.

[33]United States v. Robinson, 287 F. Supp. 245, 254-55 (N.D. Ind. 1968).

[34]324 N.E.2d 857 (Ind. Ct. App. 1975).

since the marijuana was not discovered inadvertently during the course of a search.[35] The court then stated that the real question was whether the entry under an invalid warrant could later "be justified by reliance on related but distinct theories of law or evidence."[36] In answer to this question, the court concluded that the illegality of the search and the accompanying arrests could not be altered "by reliance on what the police could have done, or by reliance on how police conducted themselves before or after the improper entry and seizure."[37] Although the court properly recognizes the principle that an unlawful entry cannot be justified by what occurs following the entry, the opinion appears to go too far by saying that the entry cannot be validated by what the officers did "before" the entry. If the court meant by this language that an entry under an invalid search warrant could not be valid on the basis of some other theory, then the decision is contrary to the opinion of the Indiana Supreme Court in *Brown v. State*.[38] In the *Brown* case, officers obtained a warrant to search a restaurant for a cash register. They went to the restaurant at a time that it was open for public business, observed the cash register on a counter, and seized the cash register. Although the court rejected the defendant's contention that the search warrant was invalid, the court added that a search warrant was not necessary for the entry into a place open for public business and that the officers could have justified their entry on that basis even if the warrant had been invalid.[39]

4. Consent to Searches

The United States Supreme Court held in *Schneckloth v. Bustamonte*[40] that a suspect who is not in custody does not have to be advised of his fourth amendment rights before being asked

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[35]For a discussion of the "inadvertence" rule see Ludlow v. State, 314 N.E.2d 750 (Ind. 1974). In that case, officers received information that seven people were in a certain house and that narcotics were being processed in a bedroom in the house. The officers learned that arrest warrants existed for two of the persons, so they entered the house, purportedly to execute the arrest warrants. As soon as they entered the house, one of the officers went to the bedroom and seized the narcotics which were there as described by the informant. The Indiana Supreme Court held that the seizure was invalid because a search warrant had not been obtained. It held that the officers could not justify the seizure on the basis of the "plain view" doctrine since they knew about the narcotics before entering the house and did not discover them inadvertently while in the house for another purpose.

[36]324 N.E.2d at 859.

[37]*Id.*

[38]239 Ind. 358, 157 N.E.2d 174 (1959).

[39]*Id.* at 366, 157 N.E.2d at 178.

[40]412 U.S. 218 (1973), *noted in* 7 IND. L. REV. 601 (1974).

to consent to a search, but the language of the opinion would also appear to suggest that there is no requirement for such a warning even as to a suspect in custody.[41] During the past year, the Indiana Court of Appeals reached the same conclusion concerning a suspect who was not in custody,[42] but the Indiana courts have not resolved the question concerning the necessity for warning a suspect in custody. The issue was before the Indiana Supreme Court in *Pirtle v. State*,[43] but the holding in that case is clouded somewhat by the fact that the opinion also dealt with a violation of the defendant's fifth amendment rights. In that case, the defendant was arrested late one night and was advised of his fifth amendment rights concerning interrogations and the assistance of counsel. He promptly asked for an attorney and the officers did not interrogate him further. The next day, another officer asked the defendant to sign a consent to search his apartment and the defendant did so. The officer did not know that the defendant had asked for an attorney, and the officer did not provide the defendant with an attorney or advise the defendant of his fourth amendment rights concerning the search. The Indiana Supreme Court concluded that the consent to search was invalid because it was obtained at a time when the officer should not have been questioning the defendant and thus the "consent was a product of a violation of appellant's *Miranda* rights."[44] If the opinion had concluded at that point, the result would have appeared to be quite logical and proper, but the court sought to bolster this conclusion with additional reasoning that left some doubt as to the full import of the decision. The court emphasized the importance of counsel in assisting a person to make the decision to consent to a search and emphasized that the defendant had been in custody for twelve hours without being advised of his fourth amendment rights. The court then concluded that there is no "practical" reason for depriving a defendant in custody at the police station of the assistance of counsel in deciding to consent to a search and said, "We hold that a person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent."[45] If the opinion is taken as a whole, it appears to hold that the consent was invalid because of the *Miranda* violation and the latter discussion merely emphasizes

[41]*See* United States v. Campbell, No. 74-1843 (4th Cir., Feb. 19, 1975); United States v. Heimforth, 493 F.2d 970 (9th Cir. 1974); United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973).

[42]Wills v. State, 318 N.E.2d 385 (Ind. Ct. App. 1974). *See also* Cooper v. State, 301 N.E.2d 772, 775 (Ind. Ct. App. 1973).

[43]323 N.E.2d 634 (Ind. 1975).

[44]*Id.* at 638.

[45]*Id.* at 640.

the reason why the *Miranda* violation was so critical. On the other hand, the language in the latter part of the opinion is so strong that it may indicate that there is a right to counsel at any time that a person in custody at a police station is asked to consent to a search. If so, the court has in effect required a defendant who is in custody to be advised of his fourth amendment rights before being asked to consent to a search, although the court is providing for this to be done by counsel rather than requiring the police officer to give the warnings.

5. *Stop and Frisk*

In *Elliott v. State*,[46] the Indiana Supreme Court reviewed the authority of an officer to conduct a "stop and frisk" and held specifically that the procedure is a "two-step" process. In that case, officers received information that a certain person was about to make a delivery of narcotics at a certain apartment. The officers went to the apartment and saw the defendant, a different individual, leaving the apartment. The defendant was known to have a record for drug-related offenses and was in the company of two known drug users. On the basis of this information, the officers stopped the three persons for interrogation. They then observed a bulge in the defendant's pocket, frisked the defendant, and found a revolver in the pocket. The court held that the circumstances warranted a "cursory investigation" so that the initial detention was lawful. When the bulge in the pocket was observed during the detention, this then justified the frisk of the defendant.

The decision is also important because it indicates that the supreme court has apparently lowered the burden of proof that the court of appeals had previously required to justify a stop and frisk. In the *Elliott* case, the Second District Court of Appeals had concluded that the officer did not have sufficient information to justify a detention of the defendant for questioning.[47] The court of appeals concluded that the officer might have had a right to investigate the matter but not the right to conduct a stop and frisk without additional reason to believe that the information was reliable. That court's view appears to be in accord with the view of the Third District Court of Appeals in *Jackson v. State*.[48] In the *Jackson* case, officers received a tip that the defendant was at a certain place carrying a gun. The officers located the defendant near a tavern sitting in his car in a parking lot. He was asked to

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[46]317 N.E.2d 173 (Ind. 1974).

[47]309 N.E.2d 454 (Ind. Ct. App. 1974), *noted in 1974 Survey of Indiana Law* 146.

[48]301 N.E.2d 370 (Ind. Ct. App. 1973).

step out of his car, and the officers then observed a pistol sticking out of his pocket. After he admitted that he did not have a permit for the pistol, he was arrested. The court of appeals held that the seizure was improper because the informer's tip was not shown to be reliable. The supreme court's decision suggests that officers are to be given more leeway in deciding when to stop and detain persons for investigative purposes than the court of appeals was willing to permit.

B. Lineups and Photographic Identifications

1. Lineups

After some eight years of controversy, the Indiana Supreme Court has apparently resolved the question in Indiana concerning the right to counsel at a lineup held prior to the filing of formal charges. In *Winston v. State*,[49] the court held that a defendant has no right to counsel at a lineup held before the defendant is formally charged by way of an information or an indictment. The case involved a situation in which the victim of an armed robbery recognized the robber and promptly notified the police. Within an hour of the robbery, the victim was called to the police station to identify the defendant. After observing the defendant through a window in the detective's room, the victim made a positive identification. Two members of the supreme court argued that the defendant had no right to counsel at this identification because it occurred within such a short period of time after the robbery, but the majority took this case as an opportunity to resolve the broader issues which had been in controversy for such a long period of time. In so doing, the court expressly overruled its earlier decision in *Martin v. State*,[50] which had held that a right to counsel existed at any "post-arrest" lineup except for identifications occurring immediately after an offense, and agreed with the Indiana Court of Appeals which had consistently held that there was no right to counsel at preindictment lineups because of the United States Supreme Court decision in *Kirby v. Illinois*.[51] The *Kirby* case is not completely clear on this point because the opinion states that the right to counsel generally exists "after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[52] The rest of the opinion, however, ap-

[49]323 N.E.2d 228 (Ind. 1975).

[50]258 Ind. 83, 279 N.E.2d 189 (1972).

[51]406 U.S. 682 (1972). *See* Pack v. State, 317 N.E.2d 903 (Ind. Ct. App. 1974). *Compare* Smith v. State, 312 N.E.2d 896 (Ind. Ct. App. 1974), *with* Collins v. State, 321 N.E.2d 868 (Ind. Ct. App. 1975).

[52]406 U.S. at 689.

pears to suggest that there is no right to counsel at a lineup held prior to the filing of an information or indictment, and the Indiana Supreme Court expressly accepted this interpretation of the opinion.[53]

The *Winston* opinion is also significant because it may be used as a precedent for another purpose. The *Martin* case was decided in March of 1972 by the Indiana Supreme Court, and the *Kirby* case was decided approximately three months later by the United States Supreme Court. Since a state may impose higher standards than required by the Federal Constitution, Indiana courts theoretically should have continued to follow the *Martin* decision until the Indiana Supreme Court held otherwise. Nevertheless, the Indiana Court of Appeals consistently followed the *Kirby* decision, apparently assuming that the Indiana Supreme Court would eventually reverse *Martin*, and the Indiana Supreme Court proved that the assumption was correct. This question was not discussed, however, but the *Winston* case does provide a precedent for trial courts in Indiana to follow when they are confronted with a difference in the decisions of the state and federal supreme courts.

Although a defendant does not have a right to an attorney at a preindictment lineup, the *Winston* case does recognize that such lineups must be conducted fairly so as not to violate fundamental concepts of due process. The First District Court of Appeals, in *Hopkins v. State*,[54] held that fundamental due process would be violated when a witness at a lineup is told that a suspect is included in the group of persons in the lineup. This decision is in accord with *Sawyer v. State*[55] in which the Indiana Supreme Court held that it was improper for an officer to tell a witness that a suspect had been arrested and that the suspect's picture was included in a group of photographs being displayed to the witness. In dictum, the supreme court also suggested that the same rule should be applied to lineups.

2. Photographic Identifications

In *Rowe v. State*,[56] the Indiana Supreme Court held that the defendant was entitled to obtain discovery of photographs displayed to a witness during the pretrial investigation of the de-

[53] *Accord*, Commonwealth v. Lopes, 287 N.E.2d 118 (Mass. 1972); Chandler v. State, 501 P.2d 512 (Okla. 1972). *Compare* United States *ex rel.* Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972), *with* Moore v. Oliver, 347 F. Supp. 1313, 1319 (W.D. Va. 1972).

[54] 323 N.E.2d 232 (Ind. Ct. App. 1975).

[55] 298 N.E.2d 440 (Ind. 1973). *See also* Vicory v. State, 315 N.E.2d 715 (Ind. 1974).

[56] 314 N.E.2d 745 (Ind. 1974).

fendant. The police had shown several albums of photographs to the witness shortly after the robbery involved and later had shown four additional photographs to the witness. This information was brought out during questioning of the witness at the trial, and the defendant then moved for production of the four photographs. The supreme court held that the motion should have been granted because the motion met the court's general requirements for discovery, but the court did not discuss the possibility that the defendant might have waived the right to discovery by waiting until the time of the trial to request the photographs.

C. Confessions and Admissions

1. Confessions

After the United States Supreme Court held in *Miranda v. Arizona*[57] that officers must first advise a suspect concerning his fifth amendment rights before initiating custodial interrogation, the United States Congress enacted a statute providing that a confession would still be admissible as evidence if found to be voluntary under the totality of all the circumstances even though all of the *Miranda* requirements were not fully satisfied.[58] Shortly thereafter, the Indiana General Assembly enacted a statute concerning the admissibility of confessions that is almost a verbatim restatement of the federal statute.[59] Although the federal and state statutes purport to limit the effect of a United States Supreme Court decision, the statutes are apparently being followed by various courts without much, if any, consideration as to their validity. For example, the Indiana statute was quoted and discussed in *State v. Cooley*[60] by the Third District Court of Appeals with the apparent assumption that the statute is valid and that trial courts should be following it in determining the voluntariness of confessions. This implied acceptance of the statutes has been apparent in the federal courts as well and was finally recognized by the United States Court of Appeals for the Tenth Circuit in *United States v. Crocker*.[61] In that case, the court reviewed the history of the federal statute and concluded that its constitutionality had been impliedly recognized by the United States Supreme Court in *Michigan v. Tucker*.[62] This conclusion may be accurate, but the issue is still unresolved, at least in Indiana.

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[57]384 U.S. 436 (1966).

[58]18 U.S.C. § 3501 (1970).

[59]IND. CODE § 35-5-5-1 (Burns 1975).

[60]319 N.E.2d 868, 869-70 (Ind. Ct. App. 1974). *See also* Larimer v. State, 326 N.E.2d 277 (Ind. Ct. App. 1975).

[61]510 F.2d 1129, 1137 (10th Cir. 1975).

[62]417 U.S. 433 (1974).

The *Cooley* case did, however, move in the direction of resolving another perplexing issue in Indiana concerning the admissibility of confessions. The court of appeals held that the state has the burden of proving the voluntariness of a confession by a preponderance of the evidence.[63] This conclusion followed the decision of the United States Supreme Court in *Lego v. Twomey*[64] in 1972 and made it clear that the court of appeals had intended to adopt this view in *Ramirez v. State*,[65] a case which was also decided in 1972 after the *Lego* decision. The court of appeals did not, however, refer to *Burton v. State*[66] which was decided in 1973 by the Indiana Supreme Court and included the statement that the state has the burden of proving voluntariness beyond a reasonable doubt.[67] Thus there is a clear conflict between the decision of the Indiana Supreme Court and the Indiana Court of Appeals, but the court of appeals did at least cite both the *Lego* decision and its own prior opinion in *Ramirez* as authority whereas the supreme court did not cite any authority whatever for its conclusion in *Burton*. It is possible that the precedent established in the *Winston* case, discussed above with reference to lineups, could be relied upon to justify the fact that the court of appeals decided to follow the United States Supreme Court rather than the Indiana Supreme Court, but the precedent is not exactly appropriate because here the Indiana Supreme Court stated its opinion on the issue over a year after the United States Supreme Court had decided the *Lego* case. The better justification probably is found in the fact noted above, that is, that the Indiana Supreme Court did not fully consider the issue in *Burton* and thus did not intend to make an authoritative statement concerning the burden of proof since it found in fact that the state had in that case met the heavy burden of proving the confession voluntary beyond a reasonable doubt.

The Third District Court of Appeals also issued another opinion during the past year concerning confessions that is of major significance in the area of juvenile affairs. In *Clemons v. State*,[68] the court held that the privilege against self-incrimination does not apply in juvenile waiver hearings and therefore a confession obtained illegally may be considered at the hearing. The court observed that guilt or innocence is not an issue at the waiver

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[63]319 N.E.2d at 870.

[64]404 U.S. 477 (1972).

[65]286 N.E.2d 219 (Ind. Ct. App. 1972), *noted in* Kerr, *Criminal Procedure, 1973 Survey of Indiana Law*, 7 IND. L. REV. 112, 128 (1973).

[66]260 Ind. 94, 292 N.E.2d 790 (1973).

[67]*Id.* at 105, 292 N.E.2d at 797-98.

[68]317 N.E.2d 859 (Ind. Ct. App. 1974).

hearing and that a confession, if considered at all, is to be considered only as it relates to the child's welfare and the best interests of the state. The court did note that the juvenile judge who hears such a confession at a waiver hearing probably should not thereafter be permitted to adjudicate the issue of delinquency if the waiver is denied.[69]

2. *Admissions*

Tacit admissions are generally accepted in civil cases,[70] but their admissibility in criminal cases has been seriously questioned since the *Miranda* decision in 1966. During the past year, the Indiana Supreme Court decided two cases that indicate that tacit admissions may still be used in criminal cases, at least under limited circumstances. In *Robinson v. State,*[71] the defendant was accused of battering her baby son to death. While a fireman was at the defendant's home after being called there to render emergency assistance, he overheard the defendant's mother say to the defendant, "You shouldn't have thrown the baby against the wall. You were beating him too hard." The fireman then heard the defendant say, "Shut up." The supreme court held that this conversation was admissible against the defendant as a tacit or "adoptive" admission. A similar result was reached in *Jethroe v. State,*[72] a case in which the defendant was accused of murdering a woman with whom he had been living. During the trial, a daughter of the victim testified that she was in the house with the victim and the defendant when the victim called the defendant's mother on the telephone and said, "Jethroe said he is going to kill me before Friday." The daughter also testified that the defendant, Jethroe, then grabbed the telephone from the victim and told his mother not to come over to the house. This evidence was also found to be admissible as a tacit or "adoptive" admission. Neither opinion, however, gave any consideration to the effect of the *Miranda* decision on the admissibility of such tacit admissions in criminal cases. Some courts have clearly held that such tacit admissions must be excluded if any official or governmental action is involved in bringing the admissions about,[73] but the *Robinson* and *Jethroe* decisions are in accord with the conclusions of other courts

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[69]*Id.* at 866 n.12. The opinion also states that hearsay is admissible in a waiver hearing. *Id.* at 865.

[70]*See, e.g.*, Springer v. Byrum, 137 Ind. 15, 36 N.E. 361 (1894); Pierce v. Goldsberry, 35 Ind. 317 (1871).

[71]317 N.E.2d 850 (Ind. 1974).

[72]319 N.E.2d 133 (Ind. 1974).

[73]*See* Commonwealth v. Dravecz, 424 Pa. 582, 227 A.2d 904 (1967).

which would admit the evidence as long as there is no official involvement.[74]

D. Self-Incrimination

1. Testimonial Compulsion

In *Frances v. State*,[75] the Indiana Supreme Court reaffirmed the view that the privilege against self-incrimination protects a person only against testimonial compulsion. The court observed that the privilege does not protect against "compulsory submission to purely physical tests such as fingerprinting, body measurements, handwriting and voice exemplars."[76] The court then held that a defendant could be compelled to undergo fingerprinting and that the defendant had no right to the presence of an attorney during such fingerprinting. This view was also followed by the Third District Court of Appeals which held in *Powell v. State*[77] that the trial court acted properly in ordering the defendant to submit to fingerprinting.

The First District Court of Appeals, however, has concluded that polygraph examinations are testimonial in nature and therefore the privilege against self-incrimination protects an accused from being required to submit to such an examination and prohibits a trial court from giving any consideration to the refusal of a defendant to submit to such an examination. In *McDonald v. State*,[78] the defendant testified in his own behalf in a nonjury trial and was asked by the trial judge if he would be willing to submit to a lie detector test. After a somewhat extended discussion between the judge and the parties to the trial, the defendant's attorney moved for a mistrial which was denied. The First District Court of Appeals reviewed the various Indiana cases concerning polygraph examinations and held that the trial judge's request was reversible error because it brought before the court the defendant's unwillingness to take the examination. In *Williams v. State*,[79] however, the First District Court of Appeals recognized that a defendant could properly waive his privilege against self-incrimination, and the court upheld the state's use of polygraph evidence on rebuttal after the defendant had raised an alibi defense. The decision is important because the waiver form signed by the defendant apparently concerned only the defendant's right to silence and right

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[74]*See* United States v. Steel, 458 F.2d 1164 (10th Cir. 1972); Miller v. Cox, 457 F.2d 700 (4th Cir. 1972).

[75]316 N.E.2d 364 (Ind. 1974).

[76]*Id.* at 366.

[77]312 N.E.2d 521 (Ind. Ct. App. 1974).

[78]328 N.E.2d 436 (Ind. Ct. App. 1975).

[79]314 N.E.2d 764 (Ind. Ct. App. 1974).

to counsel and did not include an express waiver of any objections to the use of the test results at the trial. The decision thus appears to go beyond *Reid v. State*[60] in which the Indiana Supreme Court approved the use of such evidence on rebuttal after the defendant had expressly waived any objection to the use of the test results at the trial.

2. *Grand Jury Testimony*

Traditionally, criminal procedure has generally been developed in a case-by-case, after-the-fact process. Although this system has certain strengths and worthwhile features which have ensured its continuance,[61] the Indiana Supreme Court attempted to overcome a major weakness in this system[62] in issuing its landmark decision in *State ex rel. Pollard v. Criminal Court.*[63] In the *Pollard* case, the relators sought a writ of prohibition to prevent the trial court from enforcing an order requiring compliance with a grand jury subpoena duces tecum. The Indiana Supreme Court decided the narrow issue concerning jurisdiction in favor of the respondent trial court but decided that it was also "imperative" for the court to "delineate the trial court's functions vis-à-vis the exercise of the subpoena power by the prosecutor or the grand jury."[64] This the court undertook to do in an extensive opinion which reviewed the history of the grand jury and the subpoena power and then set forth a "code" of rules and procedures to be followed with reference to grand jury proceedings. The court first held that a subpoena duces tecum could be issued to prospective witnesses before a grand jury. It then held that the constitutional prohibitions against unreasonable searches and seizures are inapplicable to such subpoenas although the subpoenas must not be issued arbitrarily and are subject to a reasonableness requirement. Finally, the court recog-

[60] 259 Ind. 166, 285 N.E.2d 279 (1972). In Austin v. State, 319 N.E.2d 130 (Ind. 1974), the Indiana Supreme Court held that a witness improperly referred to a polygraph examination but that the error was not reversible under the circumstances. In Hartman v. State, 328 N.E.2d 445 (Ind. Ct. App. 1975), the Second District Court of Appeals held that the results of a polygraph test offered by the defendant were properly excluded because the proper foundation was not established by the defendant.

[61] The case-by-case process emphasizes that an actual controversy must exist before a court will develop a procedure in lieu of legislative action and helps to ensure that adequate attention and consideration are given to a particular controversy before a new procedure is established.

[62] A major weakness, if not *the* major weakness, in the system is its after-the-fact nature which requires litigants to speculate on what procedural rule may thereafter be adopted by the court and results in a haphazard development of procedural rules rather than a unified code of rules.

[63] 329 N.E.2d 573 (Ind. 1975).

[64] *Id.* at 578.

nized that the privilege against self-incrimination applies to grand jury proceedings and set forth a number of rules to effectuate this privilege. Under these new rules, all witnesses appearing before a grand jury must be fully advised of their rights protected by the privilege; all witnesses must be advised of the general nature of the grand jury investigation, and this information must be contained in the subpoena; a witness who has already been charged with an offense or is a "target" defendant does not have to respond or comply with a subpoena to testify or a subpoena duces tecum; a witness who has already been charged or who is a "target" defendant must be advised in the subpoena of his right to the assistance of counsel in deciding whether to comply with the subpoena; a witness who appears before a grand jury and becomes a "target" defendant or a subject of the investigation must be fully advised of this fact; ordinary witnesses who are not subjects of the investigation must claim their privilege as to each question deemed incriminating; all possible questions are to be submitted to ordinary witnesses before the court is asked to review any claims under the privilege so that the review will not be "piecemeal"; and the court's review of such claims of privilege is to be conducted in a hearing *in camera.*

3. Immunity

Although immunity was discussed to some extent in the *Pollard* case, the Indiana Supreme Court did not discuss this subject fully and thus did not resolve a number of questions that still exist concerning immunity. Indiana's immunity statute was enacted during the 1969 session of the Indiana General Assembly and provides that a witness may be required to testify or produce evidence, provided that "he shall not be prosecuted or subjected to penalty or forfeiture for or on account of any answer given or evidence produced."[85] This statute has embodied language that is drawn in part from a "transactional" immunity statute, but the literal wording of the statute appears to make it more nearly akin to a "use" immunity statute. In the *Pollard* case, the court quoted the statute and discussed it to some extent but did not clearly indicate whether the statute is to be considered as a "transactional" or as a "use" statute. The court stated that "the prosecutor may secure the testimony or evidence protected by the constitutional privilege by extending to the witness an immunity which is coextensive with the privilege being relinquished."[86] In support of this statement,

[85] IND. CODE § 35-6-3-1 (Burns 1975).

[86] 329 N.E.2d at 591.

the court cited *Kastigar v. United States*[87] in which the United States Supreme Court held that a grant of use and derivative use immunity would be coextensive with the privilege under the Federal Constitution.

If the Indiana court had stopped at this point, it would appear that the Indiana statute is to be construed as a "use" statute. The court, however, cited its own earlier decision in *Overman v. State*[88] which contains language that appears to support a requirement of transactional immunity. Furthermore, the court expressed the view that the Indiana statute is similar to the Model State Witness Immunity Act[89] and is in fact "patterned after" that act.[90] If this is correct, then it should be noted that the drafters of the Model Act appear to have contemplated "transactional" rather than "use" immunity.[91] The difficulty with this view, however, is that the drafters of the Indiana statute left out of the statute certain critical words that appear in the Model Act. As noted above, the Indiana statute provides that a witness "shall not be prosecuted or subjected to penalty or forfeiture for or on account of any answer given or evidence produced."[92] On the other hand, the Model Act provides that the witness "shall not be prosecuted or subjected to penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order, he gave answer or produced evidence."[93] The Model Act follows the standard language used in transactional statutes,[94] prohibiting any prosecution for offenses to which the testimony relates, whereas the Indiana statute appears to permit prosecutions for any offenses whatever, so long as they are not instituted "because of" any testimony given. If this latter interpretation of the Indiana statute is correct, then the statute would appear to be more nearly in the nature of a "use" immunity statute than a "transactional" statute.

The matter of immunity was also considered briefly by the Second District Court of Appeals in *Hartman v. State.*[95] In *Hartman,* the defendant argued that the charges against him should

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[87]406 U.S. 441 (1972).

[88]194 Ind. 483, 143 N.E. 604 (1924).

[89]MODEL STATE WITNESS IMMUNITY ACT (1957).

[90]329 N.E.2d at 591.

[91]*See* MODEL STATE WITNESS IMMUNITY ACT, Commissioners' Prefatory Note 6 (1957).

[92]IND. CODE § 35-6-3-1 (Burns 1975).

[93]MODEL STATE WITNESS IMMUNITY ACT § 1 (1957).

[94]*Compare* Act. of Aug. 20, 1954, ch. 769, § 1, 68 Stat. 745 (repealed 1970) (a federal "transactional" statute), *with* 18 U.S.C. § 6002 (1970) (a "use" immunity statute).

[95]328 N.E.2d 445 (Ind. Ct. App. 1975).

have been dropped because the state had agreed to drop the charges if he would take and pass a polygraph test. If the court of appeals had sustained this argument, it would have established a precedent for the granting of immunity by a prosecutor apart from the statutory procedure discussed above. The court did not reach the issue, however, because it found that the defendant had failed to present evidence to the trial court that such an agreement existed. On the other hand, the court of appeals did observe that the proper procedure for asserting immunity with respect to a crime charged is to file a motion to dismiss either before or during the trial.[96]

E. Discovery

Just as the Indiana Supreme Court attempted to set forth a "code" of rules concerning grand jury proceedings in the *Pollard* case discussed above, the court also "attempted to set forth general principles concerning discovery procedure as a guide for the trial courts of this state" in the landmark case of *State ex rel. Keller v. Criminal Court.*[97] In that case, the trial court issued a wide-ranging pretrial discovery order that required extensive disclosure by both the prosecution and the defendant. Both parties sought writs of prohibition with reference to the discovery order, and the Indiana Supreme Court denied both petitions. The state was thus required to provide names and addresses of prospective witnesses, pretrial statements of such witnesses, transcripts of any grand jury testimony of such witnesses, statements of the defendant, reports of experts, real and documentary evidence to be used at the trial, and criminal records of any prospective witnesses. Likewise, the defendant was required to notify the state of any defenses which he intended to raise and to provide the state with names and addresses of prospective witnesses, pretrial statements of such witnesses,[98] reports of experts, real and documentary evidence to be used at the trial, and criminal records of any prospective witnesses. The defendant was also, at the request of the state, required to appear in a lineup, provide identification evidence, and submit to physical or medical examinations. The Indiana Supreme Court concluded that none of these requirements violated the defendant's constitutional rights and that the trial court had inherent

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[96]*See* IND. CODE § 35-3.1-1-4 (Burns 1975).

[97]317 N.E.2d 433, 438 (Ind. 1974).

[98]This part of the discovery order is supported to some extent by the decision of the United States Supreme Court which held in United States v. Nobles, 422 U.S. 225 (1975), that the prosecution was entitled, at least during the trial, to inspect a pretrial statement of a defense witness for purposes of cross-examination.

authority to require both the state and the defendant to provide such pretrial discovery so long as the trial court balanced the right to discovery by providing for reciprocity on both sides. Unfortunately, the court did not fully define "reciprocity" and thus did not clearly decide whether a trial court could grant a request of the prosecution for discovery even if the defendant had not made a request for such discovery. The opinion does, however, emphasize the inherent authority of a trial court to order discovery and here the trial court apparently ordered the discovery without regard to a request from either side. Thus it appears logical to conclude that a request for discovery by the state may be granted so long as the trial court makes certain that the defendant may also, if desired, have similar discovery.

An additional rule concerning discovery was also fashioned and announced by the Indiana Supreme Court in *Birkla v. State*.[99] In that case, the defendant's co-accused was taken from the county jail and was permitted to visit with his wife in an interrogation room at the police station. Without their knowledge, their actions and conversations were recorded by a video camera and microphone. Thereafter, the prosecutor was informed by the police that the videotape had been made. The prosecutor immediately advised the police that the tape could not be used and then viewed it for evidence that might exculpate the defendant or the co-accused. Finding no exculpatory evidence, he had the tape erased by a detective. The defendant's attorney later learned about the tape while interviewing the co-accused's wife and filed a motion for production of the tape. He then moved to dismiss the charges and sought to prevent the state from calling the co-accused's wife as a witness for the state. Both of these motions were denied. The supreme court affirmed this action of the trial court and then stated that a prosecutor who decides to destroy evidence deemed by him to be nonmaterial has a heavy burden to disprove prejudice to the defendant if the destruction occurs before the defendant's attorney is advised of the evidence. The court stated that the prosecution should consider the seriousness of the charge involved, the possible relevance of the evidence to the issue of guilt or punishment, and the possible use of the evidence by the defendant for rebuttal or impeachment, and then should retain the evidence if there is any doubt about its possible materiality. The rule was made prospective, however, and thus the burden of proving materiality and prejudice in this case was placed upon the defendant.[100]

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[99]323 N.E.2d 645 (Ind. 1975).

[100]In discussing this new rule of discovery, the court also made the observation that a prosecutor's duty to disclose exculpatory evidence under Brady

F. Guilty Pleas

Although the Indiana procedure concerning guilty pleas has been codified and in statutory form since the 1973 session of the Indiana General Assembly,[101] the cases considered by the Indiana appellate courts during the past year generally continued to involve guilty pleas entered prior to the enactment of the statutory procedure. One case, however, did involve a guilty plea entered after the enactment of the statute, and the decision suggests that the court of appeals and the supreme court may be in disagreement concerning at least one provision of the new statute. In *Garcia v. State*,[102] the trial court accepted the defendant's guilty plea without first fully advising him of his rights as required by the statutory procedure. Thereafter, a hearing was held on the defendant's motion to withdraw his guilty plea and the attorney who represented him at the guilty plea hearing testified that he had personally advised the defendant concerning his constitutional rights. The Third District Court of Appeals ultimately held that the trial court should have set the plea aside because the attorney had not fully advised the defendant concerning his right of confrontation and the duty of the state to prove his guilt beyond a reasonable doubt. The opinion is of more importance, however, because of the court's interpretation of the statute which specifically requires the judge to advise the defendant personally of his rights before accepting a guilty plea.[103] The court of appeals held that it was error for the judge not to give the advice personally but suggested that this should not be reversible error since a defendant presumably could not show any prejudice if the record clearly reflected a proper advice of rights by his attorney. In so doing, the court of appeals relied on the recent decision of the Indiana Supreme Court in *Williams v. State*.[104] In *Williams*, the supreme court did hold that the advice-of-rights requirement could be satisfied by action of the defendant's attorney, but that case involved a guilty plea entered prior to the effective date of the new Indiana statute. In fact the court referred to the date involved and stated in a footnote that if the "statutory standard had been applicable at the time of petitioners' pleas, and if the record was identical to the one before us, petitioners would undoubtedly have pre-

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v. Maryland, 373 U.S. 83 (1963), does not arise until the defendant makes a request for production. The court noted that *Brady* did not apply here because the tape was erased before the defendant's motion to produce was filed.

[101] IND. CODE §§ 35-4.1-1-2 to -6 (Burns 1975).

[102] 326 N.E.2d 822 (Ind. Ct. App. 1975).

[103] IND. CODE § 35-4.1-1-3 (Burns 1975).

[104] 352 N.E.2d 827 (Ind. 1975).

sented a solid case for post-conviction relief."[105] The court of appeals referred to this footnote but concluded that the failure of a judge to give the advice should not be reversible error since a defendant could not show any prejudice even after the enactment of the statute if his attorney has properly advised him of his rights.[106] Despite this conclusion, the same court of appeals noted in *Wyatt v. State*[107] that the preferable practice is for the trial court to give the advice of rights personally and that this practice is now mandated by the new statute.

The Indiana Supreme Court and the Indiana Court of Appeals were also in disagreement during the past year concerning the nature of the sentence that may be imposed following the granting of a new trial by way of post-conviction relief. In *Ballard v. State,*[108] the defendant was charged with robbery, first degree burglary, and automobile banditry. As a result of plea negotiations, the various charges were dismissed and the defendant entered a plea of guilty to second degree burglary. After beginning to serve a two to five year sentence for the second degree burglary conviction, the defendant filed a petition to withdraw his guilty plea. The plea was set aside, but the state then reinstituted the robbery charge and the first degree burglary charge. After a trial and conviction on both charges, the defendant was sentenced to serve ten to twenty-five years for the robbery conviction and two to five years on the first degree burglary charge. The Second District Court of Appeals affirmed this action of the trial court,[109] but the supreme court reversed and held that the defendant could only be sentenced to serve concurrent terms of two to five years on each of the charges. The supreme court recognized that this decision resulted in an "injustice" to the state of Indiana, but it emphasized that the state should not accept a guilty plea unless satisfied that the penalty to be imposed is sufficient for all of the defendant's related offenses. The court also observed that plea bargaining is "a highly questionable practice at its best" and then asserted that the state, in the absence of compelling circumstances, "should not accept pleas of guilty to relatively minor offenses in satisfaction of charges of serious crimes supported by clear and convincing evidence of guilt."[110] This appears to be the first time that the Indiana Supreme Court has questioned the practice of plea bargaining and may reflect a change in the views of the court

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[105] *Id.* at 835 n.1.

[106] 326 N.E.2d at 823.

[107] 328 N.E.2d 450, 454 (Ind. Ct. App. 1975).

[108] 318 N.E.2d 798 (Ind. 1974).

[109] 309 N.E.2d 817 (Ind. Ct. App. 1974).

[110] 318 N.E.2d at 810.

members since the recent approval of plea bargaining by both the the Indiana Supreme Court[111] and the United States Supreme Court.[112]

Finally, the Indiana Supreme Court and the First District Court of Appeals did agree during the past year that a defendant may enter a guilty plea, after being fully advised of his rights, even though he either then or thereafter denies his guilt and protests his innocence. In *Campbell v. State,*[113] the defendant entered a plea of guilty to second degree murder, but the court rejected the plea when the defendant said that he did not know if he had committed the murder and was pleading guilty "just to get it over with." Thereafter, the defendant persisted in his effort to plead guilty and said that he had no memory of the crime because he was drunk at the time. The court then decided to hear evidence concerning the crime, including testimony of eyewitnesses, and finally accepted the plea. When the defendant later attempted to withdraw his plea, his petition was denied. This decision was affirmed by the supreme court which relied on the fact that the defendant was fully advised of his rights, he was represented by counsel, and the evidence supported his plea. A similar conclusion was reached in *King v. State*[114] by the First District Court of Appeals. In that case, the defendant entered a plea of guilty to robbery but later argued that the plea should be set aside because his testimony and the testimony of the victim at the guilty plea hearing showed that he was not guilty of the offense. The court of appeals concluded that the evidence was in fact sufficient to show the defendant's guilt and that the plea was properly accepted despite the defendant's subsequent protestations of innocence. The defendant had been fully advised of his rights at the hearing, he was represented by counsel, and the victim's statement was sufficient to support the plea regardless of the defendant's own subjective motivation behind the plea.[115]

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[111]Dube v. State, 257 Ind. 398, 275 N.E.2d 7 (1971).

[112]Santobello v. New York, 404 U.S. 257 (1971).

[113]321 N.E.2d 560 (Ind. 1975).

[114]314 N.E.2d 805 (Ind. Ct. App. 1974).

[115]The voluntariness of a guilty plea was also considered in a number of other appellate decisions during the past year, including Lamb v. State, 325 N.E.2d 180 (Ind. 1975) (a defendant must raise all available grounds for relief in his first post-conviction relief petition and is barred from raising them in a subsequent petition); Brooks v. State, 316 N.E.2d 688 (Ind. Ct. App. 1974) (a plea of guilty to manslaughter was not involuntary even though the defendant was charged with murder and felony murder in a two count indictment); Pettyjohn v. State, 315 N.E.2d 729 (Ind. Ct. App. 1974) (a plea of guilty to manslaughter is not involuntary even if entered because of fear that the defendant might be convicted of murder and be sentenced to death); Baurle v. State, 314 N.E.2d 825 (Ind. Ct. App. 1974) (a plea of guilty was

G. Assistance of Counsel

1. Right to Counsel

A defendant's right to the assistance of counsel was reviewed at length in *Collins v. State*,[116] and the Third District Court of Appeals concluded that the right under article 1, section 13 of the Indiana Constitution is coextensive with the right under the sixth amendment to the Federal Constitution.[117] The court expressed approval of the recommendation of the American Bar Association that counsel should be provided for an accused "as soon as feasible" after he is taken into custody[118] but concluded that a defendant does not have an absolute constitutional right to the assistance of counsel prior to the time of arraignment to advise him concerning his speedy trial rights. The court did observe that it is "settled" that a defendant has the right to counsel at an arraignment,[119] although the Indiana Supreme Court had held six months earlier in *Moore v. State*[120] that the denial of an attorney at a preliminary hearing could not be raised by a defendant subsequent to his conviction unless the absence of counsel in some way resulted in the denial of due process during the defendant's trial.

In *Berwanger v. State*,[121] the Indiana Supreme Court disagreed with the Second District Court of Appeals and held that a defendant must be given the right to counsel during an examination under the Criminal Sexual Deviancy Act.[122] The court of appeals had held that a defendant's attorney could not be excluded from the examination but that the state's failure to give notice to the defendant's attorney would not be considered reversible error so as to nullify the examination and any subsequent proceedings.[123] Although the decision of the court of appeals has now been reversed on this issue, the supreme court did not comment on another equally important part of the decision, in which the court of appeals asserted that a defendant has "no constitutional right to have counsel present at an examination by court appointed physicians to determine one's mental capacity or state of aberration."[124] Since the

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not involuntary even though the trial court assured the defendant he would begin serving his sentence on a certain date and the parole board thereafter delayed the beginning date for the sentence).

[116] 321 N.E.2d 868 (Ind. Ct. App. 1975).

[117] *Id.* at 872 n.4.

[118] ABA STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 5.1 (1967).

[119] 321 N.E.2d at 872.

[120] 312 N.E.2d 485 (Ind. 1974).

[121] 315 N.E.2d 704 (Ind. 1974).

[122] IND. CODE §§ 35-11-3.1-1 *et seq.* (Burns 1975).

[123] 307 N.E.2d 891, 895 (Ind. Ct. App. 1974).

[124] *Id.* at 894.

supreme court considered only the sexual deviancy statute and purported to base its decision on the express language of that statute,[125] the opinion expressed by the court of appeals concerning other mental examinations would still appear to be valid.

During the past year, the Indiana Supreme Court also considered a defendant's right to represent himself in what may be a landmark decision. In *Adams v. State*,[126] the trial court denied the defendant's request to permit the defendant instead of his attorney to make the final argument to the jury. On appeal, the defendant argued that article 1, section 13 of the Indiana Constitution guaranteed him the right to be heard by himself and his attorney. This contention was rejected by the supreme court which held that the trial court had the discretion to decide whether the defendant or his attorney should give the final argument. In so doing, however, the court recognized that a defendant has an unqualified right to act as his own attorney if he invokes this right prior to the beginning of his trial and that this right is limited only if the defendant does accept the services of an attorney when the trial begins.[127] This decision thus foreshadowed and is in accord with the recent opinion of the United States Supreme Court which held in *Faretta v. California*[128] that a defendant has a right under the Federal Constitution to represent himself in both federal and state court proceedings.

2. Effectiveness of Counsel

The Indiana appellate courts have continued to apply the standard test that an attorney is presumed to be competent and that the presumption can be overcome only by strong and convincing proof that the attorney's actions or inactions rendered the proceedings a mockery of justice and shocking to the conscience of the court.[129] In view of this standard, the courts have consistently declined to review the trial tactics and decisions of defense attorneys. During the past year, the courts held that the failure of a defense attorney to raise specific defenses,[130] to call particular wit-

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[125]315 N.E.2d at 706.

[126]314 N.E.2d 53 (Ind. 1974).

[127]*Id.* at 59.

[128]95 S. Ct. 2525 (1975).

[129]Baker v. State, 319 N.E.2d 344 (Ind. 1974); Cross v. State, 316 N.E.2d 685 (Ind. Ct. App. 1974); King v. State, 314 N.E.2d 805 (Ind. Ct. App. 1974); Kindle v. State, 313 N.E.2d 721 (Ind. Ct. App. 1974).

[130]Lockhart v. State, 324 N.E.2d 811 (Ind. 1975) (failure to place defendant on the witness stand to claim self-defense); Maxwell v. State, 319 N.E.2d 121 (Ind. 1974) (failure to present evidence of insanity and self-defense); Berry v. State, 321 N.E.2d 571 (Ind. Ct. App. 1975) (failure to give

nesses,[131] to object to the admissibility of particular evidence,[132] or to poll the jury[133] did not establish that the attorney was incompetent or had rendered ineffective assistance to his client. The same standard was relied on by the courts in rejecting arguments concerning the time devoted by counsel to pretrial preparation[134] and decisions made by counsel concerning issues to be raised on appeal.[135] The Second District Court of Appeals also specifically relied upon this standard in holding that the joint representation of two co-defendants did not necessarily result in the ineffective assistance of counsel.[136]

In *Bimbow v. State*,[137] the Second District Court of Appeals was called upon to explore the right of a defendant to have experts employed at public expense to assist his counsel in preparing for trial. In the *Bimbow* case, the defendant entered a plea of insanity and was examined by two court-appointed psychiatrists. The defendant then filed a motion asking the trial court to authorize him to employ two additional psychiatrists of his own choosing at state expense, but this motion was denied. The court of appeals

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notice of alibi defense); Brooks v. State, 316 N.E.2d 688 (Ind. Ct. App. 1974) (failure to raise alibi defense).

[131]Foster v. State, 320 N.E.2d 745 (Ind. 1974) (failure to object to an alibi witness).

[132]*Id.* (failure to object to the admissibility of a rifle); Robertson v. State, 319 N.E.2d 833 (Ind. 1974) (failure to object to the admissibility of a picture of the defendant).

[133]Robertson v. State, 319 N.E.2d 833 (Ind. 1974).

[134]Colvin v. State, 321 N.E.2d 565 (Ind. 1975) (appointment of counsel one day before guilty plea); Sturgeon v. State, 325 N.E.2d 225 (Ind. Ct. App. 1975) (entry of guilty plea nine days after arrest); Daniels v. State, 312 N.E.2d 890 (Ind. Ct. App. 1974) (minimal consultation with defendant prior to trial); Short v. State, 312 N.E.2d 144 (Ind. Ct. App. 1974). In Richardson v. State, 319 N.E.2d 644 (Ind. Ct. App. 1974), the court applied this standard in rejecting the argument that an appointed public defender was unable to prepare adequately because of the heavy caseload that he was handling at the time.

[135]Greer v. State, 321 N.E.2d 842 (Ind. 1975) (a post-conviction petition which attempts to raise issues waived on appeal impliedly alleges incompetent representation by the appellate attorney); Meyers v. State, 321 N.E.2d 201 (Ind. 1975) (failure of appellate counsel to prosecute appeal). A different standard may be developing, however, with regard to an appointed public defender who fails to raise an issue on appeal after being specifically requested to do so by the defendant. *See* Simmons v. State, 310 N.E.2d 872 (Ind. 1974); Hendrixson v. State, 316 N.E.2d 451 (Ind. Ct. App. 1974); Dixon v. State, 152 Ind. App. 430, 284 N.E.2d 102 (1972).

[136]Melendez v. State, 312 N.E.2d 508, 511-12 (Ind. Ct. App. 1974). Similar conclusions were reached by the Indiana Supreme Court in Stoehr v. State, 328 N.E.2d 422 (Ind. 1975), and Martin v. State, 314 N.E.2d 60 (Ind. 1974), but the court did not clearly indicate what standard was being followed in determining the lack of prejudice to the defendants concerned.

[137]315 N.E.2d 738 (Ind. Ct. App. 1974).

held that there was no requirement for the state to appoint more than two psychiatrists to testify at the trial and that the defendant had not shown any prejudice resulting from the failure to authorize the appointment of psychiatrists to assist in the preparation of his defense. The court concluded that the defendant had no general right to such services although it apparently did recognize the right of a defendant to obtain such services when prejudice would otherwise occur. The opinion is also important because of the suggestion in the concluding paragraph that the court would follow the same rule with reference to a defendant's request for the services of investigators or of other experts.[138]

H. Defenses

A wide variety of defenses were considered by the Indiana appellate courts during the past year, with several opinions concerning defenses being issued by each of the districts of the court of appeals and by the supreme court. Entrapment appeared to be the most popular defense, being considered by each of the appellate courts. Self-defense was a close second, being considered by the supreme court and two of the districts of the court of appeals. In addition, opinions were issued by the various courts concerning the defenses of insanity, coercion, alibi, double jeopardy, and collateral estoppel.

1. Entrapment

The First District Court of Appeals led the way in developing the entrapment defense during the past year by issuing four major opinions on the subject, including *Locklayer v. State*[139] which presents a thorough analysis of the defense as it appears to be developing in Indiana. In the *Locklayer* case, the court of appeals concluded that officers must have "probable cause to suspect" that a person is engaged in illegal activity before "baiting a trap" for that person and that the existence of such "probable cause to suspect" is an issue for the judge to decide rather than a matter of fact for the jury's determination. Since the issue is for the judge to decide, the lack of probable cause can be raised by a pretrial motion to suppress or by an objection to the admissibility of evidence at the trial. On the other hand, the court recognized the general view that entrapment is a matter of de-

[138] *Id.* at 744. The opinion concludes at this point with the following quotation from *Corpus Juris Secundum:* "It has been held that there is no constitutional right, or no right in absence of statute, to have furnished, at public expense, the services of investigators, or the services of experts, including psychiatrists." 23 C.J.S. *Criminal Law* § 982(8), at 291 (Supp. 1974).

[139] 317 N.E.2d 868 (Ind. Ct. App. 1974).

fense going to the merits of the charge against a defendant and thus is a factual matter to be resolved by the jury. These views are reflected in *Hauk v. State*[140] and *Kramer v. State*[141] but the court also held in those cases that officers do not need to have "the probable cause to suspect" at the outset of an investigation but must have such information by the time of the transaction which is arranged by the officers. Finally, the court held in *Releford v. State*[142] that entrapment need not be pleaded separately as a defense but is waived if not properly raised in the trial court. The court concluded that the defense is not one that may be raised for the first time on appeal under the "fundamental error" doctrine.

These views were generally followed in the three opinions of the other two districts of the court of appeals during the past year, but each of these opinions also involved the "third party" rule.[143] According to that rule, there is no issue of entrapment when an officer approaches a suspect to make a buy of narcotics and that suspect in turn takes the officer to a "third person" who then makes the sale and is arrested. The only opnion of the Indiana Supreme Court during the past year concerning entrapment was *Kelley v. State,*[144] and it consisted of a denial of a petition to transfer the *Kelley* case from the Third District Court of Appeals. In accordance with its customary practice, the court did not file an opinion in connection with the denial of transfer, but a dissenting opinion was filed in opposition to the "third party" rule.

2. Self-Defense

A statute[145] enacted in 1971 by the Indiana General Assembly showed promise of giving major impetus to the defense of self-defense, especially after its initial review by the Third District Court of Appeals,[146] but the Indiana Supreme Court finally resolved the ambiguities in the statute by holding in *Loza v. State*[147] that the statute neither created a new remedy nor altered the procedures concerning self-defense in any aspect. The statute provided that no person "shall be placed in legal jeopardy of any kind whatsoever" for acting in self-defense.[148] The defendant argued

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[140]312 N.E.2d 92, 98 (Ind. Ct. App. 1974).

[141]317 N.E.2d 203, 208 (Ind. Ct. App. 1974).

[142]325 N.E.2d 214 (Ind. Ct. App. 1975).

[143]Telfare v. State, 324 N.E.2d 270 (Ind. Ct. App. 1975) (second district); Fischer v. State, 312 N.E.2d 904 (Ind. Ct. App. 1974) (third district); Kelley v. State, 315 N.E.2d 382 (Ind. Ct. App. 1974) (third district).

[144]324 N.E.2d 158 (Ind. 1975).

[145]IND. CODE § 35-13-10-1 (IND. ANN. STAT. § 9-2412, Burns Supp. 1975).

[146]Loza v. State, 316 N.E.2d 678 (Ind. Ct. App. 1974).

[147]325 N.E.2d 173 (Ind. 1975).

[148]IND. CODE § 35-13-10-1 (IND. ANN. STAT. § 9-2412, Burns Supp. 1975).

that he should be able to plead self-defense prior to trial and obtain a discharge by showing that he acted in self-defense. The court of appeals agreed with this contention and held that the defendant's motion for discharge should have been granted since the state did not respond to the motion and contradict the defendant's allegations that he acted in self-defense. The court thus concluded that the issue of self-defense could be ruled on as by a motion for summary judgment when the facts were not in dispute but would have to be tried before a jury if the state contradicted the defendant's version of the facts in any way.[149] The supreme court rejected this view because it believed that every claim of self-defense necessarily involves a material issue of fact since the defense deals with the defendant's state of mind and the reasonableness of his actions. It thus rejected the right of the defendant to raise the issue of self-defense in a pretrial hearing and concluded that the statute merely constituted a "legislative declaration of the public policy of the state."[150]

The general elements of self-defense were reviewed and restated by the Indiana Supreme Court in *Jennings v. State*,[151] but the court's opinion created some uncertainty about the burden of proof in such cases. The court stated that the defendant's evidence may have been sufficient to show that he was in apparent danger of death or great bodily harm but that "a review of the evidence indicates that defendant failed to establish the other requisite elements of self-defense."[152] The court then reviewed the evidence concerning the other two elements of self-defense, that the defendant acted without fault and was in a place where he had a right to be, and held that the evidence supported the jury's conclusion "that defendant failed to prove that he was without fault" and the finding that the defendant's criminal actions "curtailed" his right to be at the scene of the crime.[153] Although the court thereafter observed that the burden was on the state to prove beyond a reasonable doubt that the defendant killed the decedent and that the killing was done purposely and maliciously, there was no direct statement that the state had the burden of disproving self-defense beyond a reasonable doubt. As a result, the Second District Court of Appeals was promptly called upon to resolve the ambiguity created by the language in this opinion. In *Woods v. State*,[154] the court of appeals held that the state does have the burden of proving

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[149] 316 N.E.2d at 683.

[150] 325 N.E.2d at 176.

[151] 318 N.E.2d 358 (Ind. 1974).

[152] *Id.* at 360.

[153] *Id.*

[154] 319 N.E.2d 688 (Ind. Ct. App. 1974).

beyond a reasonable doubt that the defendant did not act in self-defense but only after the defendant has "come forward with evidence" to raise a reasonable doubt upon the issue of self-defense.[155] The court did observe, however, that the defendant would not necessarily have this burden of going forward in all cases since the state's own evidence might disclose the issue of self-defense. Having resolved the ambiguity concerning the burden of proof, the court of appeals then decided that it was not error for the trial court to refuse a specific instruction tendered by the defense concerning such a burden. It held that there was no precedent requiring such an instruction and that the burden on the issue of self-defense was properly covered by the general instruction concerning the state's burden of proof.[156]

3. Insanity

Once the concept of two-stage trials was accepted by the Indiana Supreme Court, it was only a matter of time until the court was asked to extend the concept from habitual offender cases[157] to cases involving a plea of insanity. The issue was before the Indiana Supreme Court on two occasions during the past year, and the court decided that there is no automatic right to a two-stage trial in insanity cases but left open the possibility that a defendant might obtain such a trial under proper circumstances. In *Hester v. State,*[158] the defendant requested a bifurcated trial and stated that it was necessary because he could not remember what occurred at the time of the alleged offense. The Indiana Supreme Court held that there is no consitutional right to a bifurcated trial in insanity cases but observed that the Indiana rules of procedure "would authorize a bifurcated trial upon such issues, in a proper case."[159] The court referred to Trial Rules 42(B) and 42(C) which authorize such trials when necessary "to avoid prejudice" or "for good cause shown" and concluded that the defendant's "alleged reason for requesting the two-stage trial" was not sufficient to show "probable and substantial prejudice" requiring such a trial.[160] This decision was followed shortly thereafter in *Sexton v.*

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[155]*Id.* at 693. *See also* Marine v. State, 301 N.E.2d 778 (Ind. Ct. App. 1973).

[156]The issue of self-defense was also raised in Williams v. State, 316 N.E.2d 354 (Ind. 1974), and Scruggs v. State, 317 N.E.2d 807 (Ind. Ct. App. 1974). Both cases emphasized that self-defense is an issue for the trier of fact and that the evidence is to be considered from the defendant's viewpoint.

[157]*See* Lawrence v. State, 259 Ind. 306, 286 N.E.2d 830 (1972).

[158]315 N.E.2d 351 (Ind. 1974).

[159]*Id.* at 353.

[160]*Id.*

State,[161] but the latter opinion contains only a citation to *Hester* for authority without any discussion of the reason for the defendant's request or the reason for the denial of the request.[162]

4. *Other Defenses*

Coercion was recognized as a defense by the Third District Court of Appeals in *Hood v. State*,[163] a case involving an attempted armed robbery. The defendant alleged that he participated in the robbery only because two men had abducted him and his fiancee and had threatened to kill his fiancee if he did not commit the robbery. The court of appeals agreed that coercion or duress could be a defense but held that the jury was justified in rejecting the defense. The Third District Court of Appeals also held in *Dockery v. State*[164] that testimony concerning an alibi was properly excluded because the defendant had failed to give the required advance notice.[165]

The defense of former jeopardy was considered in *Beard v. State*[166] by the Second District Court of Appeals which stated by way of dicta, that the "burden of proof is upon the defendant in establishing a defense of former jeopardy."[167] In support of this statement, the court cited *Ford v. State*,[168] but the Indiana Supreme Court stated in the *Ford* case that a defendant has "the duty of going forward with the proof to sustain his defense of former jeopardy."[169] Thus the *Beard* opinion contains an ambiguity that is similar to the one discussed above with reference to the *Jennings* case and the insanity defense.

Two decisions of the Indiana Supreme Court during the past year also suggest that the court may be developing a doctrine of collateral estoppel to supplement the defense of former jeopardy. In *Johnson v. State*,[170] the defendant was originally charged in the Marion Municipal Court with the offense of robbery. Thereafter,

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[161] 319 N.E.2d 829 (Ind. 1974).

[162] The defense of insanity was also considered in Faught v. State, 319 N.E.2d 843 (Ind. Ct. App. 1974), by the First District Court of Appeals which reaffirmed the view that evidence of drug addiction may be considered on the issue of insanity but that drug addiction itself is not a defense. The Second District Court of Appeals also held in Bimbow v. State, 315 N.E.2d 738 (Ind. Ct. App. 1974), that a defendant is not entitled to have court-appointed psychiatrists of his own choosing to assist in the preparation of his defense.

[163] 313 N.E.2d 546 (Ind. Ct. App. 1974).

[164] 317 N.E.2d 453 (Ind. Ct. App. 1974).

[165] IND. CODE § 35-5-1-1 (Burns 1975).

[166] 327 N.E.2d 629 (Ind. Ct. App. 1975).

[167] *Id.* at 631.

[168] 229 Ind. 516, 98 N.E.2d 655, *cert. denied*, 342 U.S. 873 (1951).

[169] *Id.* at 520, 98 N.E.2d at 656.

[170] 313 N.E.2d 535 (Ind. 1974).

the defendant was charged in the Marion Criminal Court with robbery and armed robbery. Eventually, the defendant was tried on charges of robbery and inflicting injury in the commission of a robbery. The Indiana Supreme Court first held that the six month limitation under Criminal Rule 4(A) began to run from the date of the charge filed in the Marion Municipal Court rather than from the date of the charges filed in the Criminal Court. The court then held that the original charge of robbery was barred because more than six months had elapsed by the time of the defendant's trial. The court also held that the charge of inflicting injury in the commission of a robbery, although tried within six months of being filed, was likewise barred because it was filed after the six-month period had run on the robbery offense and because the robbery offense was an indispensable element of the offense of inflicting injury in the commission of a robbery. The court concluded that "the State was estopped to charge the appellants with inflicting injury in the commission of a robbery."[171] The dissenting justices argued that the six-month period on the robbery charge did not begin to run on the date that the charge was filed in the Municipal Court but began to run when charges were filed in the Criminal Court. They were outvoted on this issue by the majority, but just two months later a unanimous court decided the case of *Holt v. State*[172] and appeared to adopt their viewpoint without discussing the apparent inconsistency with the *Johnson* decision. The dissenting justices also argued that the offense of robbery and the offense of inflicting injury in the commission of a robbery are separate and distinct offenses and that the court should not adopt the view that all offenses committed in the course of the same occurrence are to be charged at the same time and prosecuted within the same period of time or be barred from prosecution. The majority did not directly discuss the doctrine of collateral estoppel although the opinion contained the word "estopped," but the dissenting justices did discuss the doctrine and noted that the appellants relied upon the doctrine in their arguments. Thus the doctrine must have been considered by the court to some extent, but the majority opinion does not disclose the extent to which the doctrine may have been used to support the final decision.

The second decision of the court which is closely related to this issue is *Ballard v. State*,[173] discussed above with reference to guilty pleas. The court was divided in the same manner as in the *Johnson* case, and the *Ballard* opinion did not contain any reference

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[171] *Id.* at 537-38.

[172] 316 N.E.2d 362 (Ind. 1974). *See also* Simmons v. State, 324 N.E.2d 513, 515 (Ind. Ct. App. 1975).

[173] 318 N.E.2d 798 (Ind. 1974).

to the doctrine of collateral estoppel. Nevertheless, the *Ballard* case is clearly related to the doctrine because it emphasizes that the prosecution's decision to accept a guilty plea to one or more charges related to a certain occurrence may thereafter limit the prosecution's ability to pursue additional charges arising out of the same occurrence.

I. Sentencing

1. Appellate Review of Sentences

Sentences in criminal cases are limited by three specific provisions of the Indiana Constitution which prohibit excessive fines, prohibit cruel and unusual punishment, and require that sentences be proportioned to the nature of the offense involved.[174] The Indiana appellate courts have generally held that the determination of appropriate penalties for criminal acts is a legislative function and that the appellate courts have only a limited authority to review sentences to determine if they violate any of the various constitutional provisions concerning sentencing. This view was reiterated in a number of opinions during the past year in which the appellate courts indicated that they would not set aside a sentence because it appeared to be too severe but would review sentences only to see if they were proportioned to the nature of the offense involved, imposed "atrocious or obsolete punishments," or were "grossly and unquestionably excessive."[175] In *Beard v. State*,[176] however, the Indiana Supreme Court was reminded that it was given authority by a 1970 amendment to the state constitution to review and revise sentences,[177] and the court was asked to exercise this authority by reducing a life sentence which had been imposed upon the defendant. The court recognized that it had been given this additional authority but declined to exercise the authority because it appeared to go beyond the court's inherent power to review sentences that exceed constitutional limitations and because "a program of policies and procedures" had not yet been established for the exercise of such authority.[178]

The *Beard* decision considered the effect of the constitutional amendment upon the authority of the Indiana Supreme Court to review a legislative decision concerning sentencing, but the constitutional amendment also poses a question concerning the authority

[174]IND. CONST. art. 1, § 16.

[175]Beard v. State, 323 N.E.2d 216, 219 (Ind. 1975); Rowe v. State, 314 N.E.2d 745, 749 (Ind. 1974); Smith v. State, 312 N.E.2d 896, 900 (Ind. Ct. App. 1974); Clark v. State, 311 N.E.2d 439, 440 (Ind. Ct. App. 1974).

[176]323 N.E.2d 216, 219 (Ind. 1975).

[177]IND. CONST. art. 7, § 4. *See also id.* art. 7, § 6.

[178]323 N.E.2d at 219.

of the supreme court to review the decision of a trial court when the trial court has some choice or discretion in imposing sentences. This latter question has not yet been resolved, although the court did observe in *Dickens v. State*[179] that "the authority of the Supreme Court to modify or revise a sentence has been constitutionalized" by this 1970 amendment.[180] The 1970 constitutional amendment has created similar questions concerning the authority of the Indiana Court of Appeals,[181] and the latter question was considered during the past year by the Second District Court of Appeals in *Wills v. State.*[182] The defendant in the *Wills* case had been sentenced by the trial court to serve two years in prison for carrying a pistol without a permit and asked the appellate court to reduce his sentence because of its severity under the circumstances of the case. The trial judge had imposed a two year sentence under a statute which gave him authority to impose a fine or imprisonment for a determinate period of from one to ten years,[183] and the court of appeals concluded that it could not reduce the sentence because there was no showing that the trial judge had abused his discretion. The court of appeals cited and relied on its earlier decision in *Gray v. State,*[184] in which the court, especially as discussed in the concurring opinion, first considered the effect of the new constitutional provision. The cases suggest that the appellate courts may begin to review sentences more frequently, but it is not clear whether this is because of newly created authority under the constitutional amendment or because the amendment codified and called attention to the inherent but seldom exercised authority of the appellate courts to take such action.

2. Felony Murder Sentences

During the past year, the Indiana Supreme Court held that first degree murder is included within the offense of felony murder,[185] but the court reaffirmed its view that felony murder, "although designated as first degree murder, does not carry with it charges of second degree murder or manslaughter."[186] In *Franks v. State,*[187] the defendant was charged in an indictment with felony murder and premeditated murder. After being convicted on both counts, the defendant was sentenced to life imprisonment on each

[179]260 Ind. 284, 295 N.E.2d 613 (1973).
[180]*Id.* at 293, 295 N.E.2d at 619.
[181]IND. CONST. art. 7, § 6.
[182]318 N.E.2d 385 (Ind. Ct. App. 1974).
[183]IND. CODE § 35-23-4-14 (Burns 1975).
[184]305 N.E.2d 886 (Ind. Ct. App. 1974).
[185]Franks v. State, 323 N.E.2d 221 (Ind. 1975).
[186]Hester v. State, 315 N.E.2d 351, 354 (Ind. 1974).
[187]323 N.E.2d 221 (Ind. 1975).

count. On appeal, the Indiana Supreme Court held that the defendant could not be sentenced on both counts because the premeditated murder offense was included within the felony murder charge.[188] The court did not consider the propriety of having two charges of this nature in the same indictment, apparently because the issue was not raised by the defendant, but the court has held in the past that it is improper for the state to include two counts in an indictment or information when the offense alleged in one count is included within the other count.[189] In *Birkla v. State*,[190] decided only a week after the *Franks* case, the Indiana Supreme Court considered a similar case in which the defendant was also charged with felony murder and first degree murder, but in this instance the jury had returned a verdict of only second degree murder in addition to the conviction for felony murder. On appeal, the court affirmed both convictions and the sentences which were imposed on each count, but the court did not discuss the propriety of such sentences, again apparently because the defendant did not raise the issue. The decision does appear to be correct, however, because of the court's general view that a charge of felony murder includes first degree murder but not second degree murder or manslaughter, a view that was reaffirmed in *Hester v. State*,[191] the court's third major decision during the past year concerning felony murder charges.

3. Accessories and Accomplices

In *Thomas v. State*,[192] the defendant was convicted as an accessory after the fact of theft from the person and as an accessory after the fact of kidnapping. On appeal, he argued that the accessory statute[193] is invalid because it provides the same penalty for the accessory as for the principal. The Indiana Supreme Court rejected this argument and held that the penalty is not dispoportionate to the nature of the offense and is neither cruel nor unusual.

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[188] *Id.* at 225.

[189] Webb v. State, 259 Ind. 101, 284 N.E.2d 812 (1972).

[190] 323 N.E.2d 645 (Ind. 1975).

[191] 315 N.E.2d at 345. The court's discussion of this matter is dictum, however, because the court was actually concerned with whether the felony murder charge in the case included the lesser offense of robbery, the collateral offense giving rise to the felony murder charge. On this latter issue, the court held that such collateral offense could be included within the felony murder charge.

[192] 321 N.E.2d 194 (Ind. 1975).

[193] IND. CODE § 35-1-29-3 (Burns 1975).

4. *Criminal Sexual Deviancy*

In *Pieper v. State,*[194] the defendant was convicted of sodomy and kidnapping. He then requested the court to have him examined as a possible criminal sexual deviant. The court sentenced the defendant to life imprisonment on the kidnapping charge and found the defendant to be a criminal sexual deviant on the basis of the sodomy charge. The defendant was committed to the Department of Mental Health with an order that he was to be transferred to the appropriate penal institution after being released by the department. The defendant argued on appeal that the sodomy and kidnapping charges should have been considered as merged for purposes of the criminal sexual deviancy statute and that he could not be confined under the kidnapping conviction after undergoing the sexual deviancy treatment. The Indiana Supreme Court held that the trial court could properly separate the two offenses for purposes of the sexual deviancy statute even though the offenses occurred at the same time and the kidnapping was partly or wholly motivated by the desire to commit the sexual offense. As discussed above, the court also held in *Berwanger v. State*[195] that a defendant must be given the right to counsel during an examination under the sexual deviancy statute.

5. *Drug Abuse Treatment*

The 1973 decision of the Third District Court of Appeals in *McNary v. State*[196] was considered in a number of cases by the other district courts during the past year. In the *McNary* case, the court held that a trial court must order an examination under the drug abuse treatment statute[197] for any defendant that the court has reasonable grounds to believe might be eligible for such treatment. In *Glenn v. State,*[198] the Second District Court of Appeals held that a trial court must advise a defendant of the possibility of treatment and offer to have the defendant examined whenever the court has reasonable grounds to believe that the defendant may be eligible for treatment. If the Department of Mental Health recommends treatment and agrees to accept the defendant, the court must then determine whether the treatment would rehabilitate the defendant before taking further action in the defendant's case. In *Reas v. State,*[199] the First District Court of Appeals held that a defendant has no right to treatment in lieu of imprisonment merely

[194]321 N.E.2d 196 (Ind. 1975).
[195]315 N.E.2d 704 (Ind. 1974).
[196]297 N.E.2d 853 (Ind. Ct. App. 1973).
[197]IND. CODE §§ 16-13-6.1-1 to -34 (Burns Supp. 1975).
[198]322 N.E.2d 106 (Ind. Ct. App. 1975).
[199]323 N.E.2d 274 (Ind. Ct. App. 1975).

because he satisfies the statutory eligibility requirements. The trial court, in its discretion, may deny such treatment if it doubts the possibility of rehabilitation. In *Thurman v. State*,[200] the Second District Court of Appeals held that a court has no authority to suspend a defendant's sentence and order treatment under the statute when the defendant files a petition for such treatment more than six months after beginning to serve his sentence. The court distinguished the *McNary* case because the defendant in *McNary* requested the treatment within six months after his sentence was imposed.[201]

6. *Credit for Pretrial Confinement*

In 1972, the Indiana General Assembly enacted a statute providing that a defendant is to receive credit for time spent in pretrial confinement.[202] When this statute was first questioned, the Indiana Supreme Court held that it was not retroactive because the legislature had not included a provision for retroactive application of the statute.[203] The statute was considered again during the past year, and this time the Indiana Supreme Court held that the statute had to be given retroactive application because of the equal protection clauses in both the Federal Constitution and the Indiana Constitution.[204] The court noted that its earlier decision had been based only upon an interpretation of the legislative intent concerning the statute whereas the defendant in the latter case had raised the constitutional arguments for the first time.[205]

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[200]320 N.E.2d 795 (Ind. Ct. App. 1974).
[201]*See* IND. CODE § 35-7-1-1 (Burns 1975).
[202]*Id.* § 35-8-2.5-1 (Burns 1975).
[203]Fender v. Lash, 304 N.E.2d 209 (Ind. 1973).
[204]Brown v. State, 322 N.E.2d 708 (Ind. 1975).
[205]*Id.* at 710.