language of the statute, which states: "[A]ny creditor who fails to comply [with this Act] with respect to any person is liable to such person . . . ."[118] Finally, the court noted that its decision would obviate some practical questions that might be generated by a holding that joint obligors could recover only one penalty. For example, if one joint obligor sued and the other joint obligor was not joined as a party, would the suing obligor be entitled to recover the full penalty or only one-half of it? If one joint obligor recovered the entire penalty, could the other joint obligor sue for his one-half?

VII. Criminal Law and Procedure

*M. Anne Wilcox**

The decisions handed down during this survey period and discussed in this Article deal exclusively with statutory provisions now superseded by the enactment of a unified code of criminal law and procedure for the State of Indiana, effective on October 1, 1977.[1] The Indiana Supreme Court and Court of Appeals opinions and judicial interpretations under prior law will have continued vitality for the practitioner as prosecutions under these former statutes reach the trial and appellate states and will continue to serve as guidelines for the exploration of issues raised by the new Penal Code. The opinions that are included in this survey were chosen for their significance to the area of criminal law with emphasis upon their applicability to general constitutional and procedural principles. The cases are discussed in the order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pre-trial matters and continuing with issues pertaining to the trial and post-trial stages.

A. Search and Seizure

1. Arrest Warrants.—The protections afforded by the fourth amendment[2] in regard to unreasonable arrests and detentions were extended to a defendant in a paternity proceeding in *J.E.G. v. C.*

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[118]15 U.S.C. § 1640(a) (Supp. V 1975).

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The author wishes to thank Joy R. Tolbert for her assistance in the preparation of this discussion.

[1]*See* Kerr, *Foreword: Indiana's Bicentennial Criminal Code, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 1 (1976). *See also* Kerr, *Forward: Indiana's New and Revised Criminal Code, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 1 (1977).

[2]U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

J.E.[3] The Second District Court of Appeals created an exclusionary rule applicable to admissions made in a civil proceeding where they were fruits of an illegal arrest or detention.[4] Upon filing of a verified petition for paternity naming J.E.G. as the putative father, the trial court summarily issued a warrant for his arrest pursuant to a statutory provision authorizing issuance of warrants in a paternity action.[5] The defendant was arrested and detained for eight days in the Madison County Jail prior to his initial appearance before the trial court. The nature of the action and the ramifications of a judgment of paternity were then explained to the defendant, who was unrepresented. In response to a direct inquiry of the court and while under oath, J.E.G. acknowledged the child. On this admission alone, the trial court entered a judgment of paternity. The court of appeals held that issuance of an arrest warrant in lieu of a summons in a paternity suit was unreasonable in the absence of probable cause to believe that the defendant was the putative father *and* that he would not respond to a notice of commencement of the suit against him. Analyzing the seizure provision of the fourth amendment, the court found its application to be controlled by the nature of the physical restraint placed upon a person rather than the purpose underlying the restraint.[6] Relying upon federal case law that applied the fourth amendment protections to administrative regulatory sear-

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no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The fourth amendment is applicable only to the federal government. However, most of the guarantees included in this amendment, as well as those found in the other amendments to the United States Constitution which formulate the Bill of Rights, have been incorporated by the fourteenth amendment guarantee of due process, which is applicable to the states. Later references will be to the specific guarantees found in the Bill of Rights.

[3]360 N.E.2d 1030 (Ind. Ct. App. 1977).

[4]The court relied upon the recent United States Supreme Court decision in Brown v. Illinois, 422 U.S. 590 (1975) (requiring suppression of any confession given after an illegal arrest or detention unless purged of that primary taint), in ruling that the detention was coercive where the defendant's release was conditioned on his confession of paternity. For further discussion of this issue, *see* text at notes 44-47, *infra*.

[5]IND. CODE § 34-4-1-13 (1976) provides: "Upon the filing of such petition the court may direct the clerk to issue a warrant in lieu of a summons for the defendant, if the defendant be the alleged father. Such warrant and the issuance and execution thereof shall be as provided for by law in criminal actions."

[6]The court referred to the Indiana Supreme Court's recognition of the arrest provision of IND. CODE § 31-4-1-13 (1976) as criminal in character in State *ex rel.* Beaven v. Marion Juvenile Court, 243 Ind. 209, 184 N.E.2d 20 (1962), and analogized the statutes governing issuance of an arrest warrant for commission of a misdemeanor. J.E.G. v. C. J.E., 360 N.E.2d at 1034-35. A warrant is sanctioned only if the court has reasonable cause to believe that the accused will not appear as directed. IND. CODE § 35-1-17-2(b) (1976).

ches,[7] the court held that any restraint upon individual liberty occasioned by an arrest is subject to a requirement of reasonableness.

2. Investigatory Stops.—A detention is considered to be a technical seizure of the person and must conform to the dictates of the fourth amendment, which proscribes "unreasonable searches and seizures." The issue surfaces in the context of a defendant's attempt to suppress the introduction of evidence seized during a search incident to the detention. A warrantless seizure must be predicated upon circumstances that would justify both the initial stop and the extent of the subsequent search.[8] Investigatory stops encompass the brief detention of a suspect for the purpose of inquiry into his identity, conduct, or knowledge of criminal activity and a stop and frisk procedure, which entails a physical invasion of the suspect to determine if he is armed or dangerous.

Two decisions by the First District Court of Appeals discussed the standard applicable to investigatory stops. *Madison v. State*[9] held that the constitutionality of a detention for purposes of mere inquiry depends solely on the reasonableness of the action taken by the police. The defendant was asleep in a car parked in the picnic area of a park on a Sunday morning. Upon approaching the car to determine if the defendant was "all right," one officer observed a belt buckle worn by the defendant, which appeared to be a pipe for smoking marijuana. He looked into the window of the car where he observed three cellophane bags containing the drug, which he seized.

The court held that there are two standards in Indiana for measuring the reasonableness of an investigatory stop. A stop is authorized for "unusual conduct" whenever an officer reasonably infers from on-the-scene observations and in light of his experience

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[7]*See, e.g.*, United States v. Biswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); Camara v. Municipal Court, 387 U.S. 523 (1967).

[8]The parameters of a warrantless intrusion into the "zone of privacy" are defined by statute in Indiana in accordance with the United States Supreme Court's holding in Terry v. Ohio, 392 U.S. 1 (1968), which permits an officer to approach a person to investigate possible criminal behavior even though he lacks probable cause to make an arrest. IND. CODE § 35-3-1-1 (1976) authorizes a stop for "unusual conduct" whenever

> a law enforcement officer in a distinctive uniform, or in plain clothes after having identified himself as a law enforcement officer reasonably infers, from the observation of unusual conduct under the circumstances and in light of his experience, that criminal activity has been, is being, or is about to be committed by any person, observed in a public place said officer may stop such person for a reasonable period of time and may make reasonable inquiries concerning the name and address of such person and an explanation of his action. Said stopping and inquiry shall be limited to those matters under the enforcement jurisdiction of the particular officer and when conducted within the limits specified herein shall not constitute official custody or arrest and shall not constitute grounds for civil liability for false arrest or false imprisonment.

[9]357 N.E.2d 911 (Ind. Ct. App. 1976).

that criminal conduct is involved.[10] This also entails a dual inquiry to determine whether the initial investigation was justified and, if so, whether the circumstances called for a check for identification. The court held that the officers were justified in approaching the defendant's car on the basis of their concern for his well being, but his appearance and response were sufficient to dispel the need for further investigation. A separate standard is applied when the investigatory stop is founded on information supplied by another person rather than the officer's personal observation. The facts known to the officer at the time he stopped the defendant must be sufficient to warrant a reasonable man's belief that the investigation was appropriate.[11] The same court applied this standard in *Cissna v. State*,[12] where an officer responded to a radioed description of a suspect in a burglary, spotted Cissna in the vicinity of the crime, and requested that he identify himself. The issue before the court was the officer's failure to advise the defendant of his *Miranda*[13] rights prior to requesting identification. Relying on *Dillon v. State*,[14] the court held that investigation of the circumstances of a crime where a defendant is asked routine questions and is not in custody is not within the ambit of *Miranda*.

The finding of probable cause to detain a defendant for the purpose of a frisk or pat down for weapons was sustained in *Burhannon v. State*,[15] where the situation had the appearance of a drug transaction, but no contraband was actually observed. An officer on surveillance observed an exchange of money between the defendant and a known drug dealer. The court gave weight to the officer's prior experience of arresting the defendant on a drug related charge and a tip from an unidentified source that Burhannon was dealing in narcotics. A full custodial arrest and the search and seizure incident

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[10]IND. CODE § 35-3-1-1 (1976). *See* Landrum v. State, 338 N.E.2d 666 (Ind. Ct. App. 1975).

[11]Luckett v. State, 259 Ind. 174, 284 N.E.2d 738 (1972), and Williams v. State, 261 Ind. 547, 307 N.E.2d 457 (1974), required a driver of a motor vehicle to produce an operator's license when stopped by an officer responding to a radio dispatch regarding a crime committed where the vehicle matched the description given in the communique.

[12]352 N.E.2d 793 (Ind. Ct. App. 1976).

[13]Miranda v. Arizona, 384 U.S. 436 (1966). In *Miranda*, the Supreme Court required that a suspect undergoing custodial interrogation must be advised that

> he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

[14]257 Ind. 412, 275 N.E.2d 312 (1971) (defendant was asked if he had the fruits of a crime in his possession).

[15]361 N.E.2d 928 (Ind. Ct. App. 1977).

thereto were justified by the defendant's resistence to the limited intrusion of a stop and frisk investigation. The analysis of the Second District Court of Appeals comports with the two-step process enunciated by the Indiana Supreme Court in *Elliott v. State*,[16] where the officers, acting on information supplied by a confidential informant, went to the location specified and observed the defendant in the company of two known drug users. Although the defendant was not the individual named by the informant, the arresting officer's knowledge of his record of drug related offenses warranted a cursory investigation.[17] The initial detention being lawful, the officer's observation of a bulge in Elliott's pocket justified the subsequent frisk of the defendant.

3. Motor Vehicles.—Some equivocation was apparent in the Third District Court of Appeals decision in *Clark v. State*[18] with respect to the burden of proof required to justify an investigatory stop of a motor vehicle. In *Clark*, the defendant was stopped in his vehicle on the basis of a radio description, which included the license number, model, color, and number of occupants. The information was supplied by a security guard who had observed two "suspicious" persons, one of whom was carrying a handgun concealed in a brown handbag. Clark was searched after being placed under custodial arrest on a traffic warrant. As a result, a vial of heroin was seized from his person. The court held that the initial stop was founded upon the information supplied by the radio dispatch and that officers are not required to ascertain the reliability or credibility of the initial source of the information.[19] The court distinguished *Jackson v. State*[20] in which the court previously held that the stop and subsequent search and seizure were improper because an informant's tip was not shown to be reliable, on the grounds that the informant was unknown and that the defendant was in a parked vehicle when approached. The court confused the issue by further holding that the security guard's observation of Clark carrying a concealed weapon was "unusual conduct" that would constitute a crime in the absence of a license. This seemingly undermines the

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[16]262 Ind. 413, 317 N.E.2d 173 (1974).

[17]*Cf.* Bowles v. State, 256 Ind. 27, 267 N.E.2d 56 (1971); Jackson v. State, 157 Ind. App. 662, 301 N.E.2d 370 (1973) (in both cases information supplied by unknown informants was held to create a mere suspicion of illegal activity).

[18]358 N.E.2d 761 (Ind. Ct. App. 1977).

[19]The dissenting opinion presents a cogent analysis of the ramifications of a literal interpretation of this statement in light of Madison v. State, 357 N.E.2d 911 (Ind. Ct. App. 1976), which held that a separate standard applies when the investigatory stop is founded on information provided by another person. *Id.* at 913. The dissent argued that the creation of a "new standard of probable cause for electronic communications" would encompass only form and mode of transmission. 358 N.E.2d at 764 (Staton, P.J., dissenting).

[20]157 Ind. App. 662, 301 N.E.2d 370 (1973).

court's earlier statement that an officer has no duty to verify the original source of information in an official radio dispatch. The rationale supplied to support the officers' continued detention of Clark for identification was the danger inherent in the suspects' use of an automobile on public streets while armed. The capacity for instant mobility possessed by Jackson, who was found behind the wheel of his parked vehicle, and the informant's statement that he was armed with a deadly weapon substantially weakens the factual distinctions drawn by the court.

The express adoption of the objective test of *Terry v. Ohio*[21] to determine the reasonableness of an investigatory stop may support a narrower interpretation of the holding in *Clark*, bringing the Third District's position on the amount of information required to stop a motor vehicle in line with recent Indiana Supreme Court decisions.[22] The *Clark* court's reliance on information received from other sources as well as on-the-scene observations of a quaisi-law enforcement official signals its acceptance of the standard found in *Luckett v. State*,[23] which emphasizes the officer's knowledge rather than his observations alone. Two cases involving investigatory stops have been decided by the Third District Court of Appeals since *Clark*. *Zanik v. State*[24] upheld an investigatory stop of a motor vehicle partially founded on information relayed by radio without discussion of its reliability or credibility. The officer's observations at the scene corroborated the report and were arguably sufficient in themselves to justify the stop, yet the court applied the *Luckett* standard and determined reasonableness from the officer's knowledge. *Jenkins v. State*[25] upheld a stop and frisk based solely on the officer's observations without reference to *Luckett*.

B. Pre-Trial Confrontations[26]

The "independent basis test"[27] is applied to determine whether an unconstitutionally suggestive pre-trial identification resulted in

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[21]392 U.S. 1 (1968).

[22]Luckett v. State, 259 Ind. 174, 284 N.E.2d 738 (1972), held that an officer could rely on information received from other sources in determining the need for a stop and frisk and was not limited to his "observations of 'unusual conduct' under the circumstances and in light of his experience" as provided in the statute. *Id.* at 179-82, 284 N.E.2d at 741-43. This standard was applied in Williams v. State, 261 Ind. 547, 307 N.E.2d 457 (1974). For further discussion of this issue, *see* Kerr, *Criminal Law and Procedure, 1974 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 112, 114-17 (1974).

[23]259 Ind. 174, 284 N.E.2d 738 (1972).

[24]361 N.E.2d 202 (Ind. Ct. App. 1977).

[25]361 N.E.2d 164 (Ind. Ct. App. 1977).

[26]For an example of an impermissibly suggestive pre-trial identification, *see* Foster v. California, 394 U.S. 440 (1968).

[27]The Indiana Supreme Court adopted this test in Swope v. State, 325 N.E.2d 193

the likelihood of irreparable misidentification, which tainted any subsequent identification. This test considers only the objective circumstances surrounding the witness' observation of the defendant. In *Norris v. State*,[28] the defendant misapprehended the constitutional framework that supports the finding of fatally tainted in-court identification. The "independent basis test" is part of a separate doctrine that mandates the exclusion of testimony of an extrajudicial identification conducted so as to deny the defendant the assistance of counsel.[29] It becomes relevant only after the pre-trial confrontation is held to be violative of fundamental due process.[30] Norris claimed that the witness' viewing of a newspaper photograph of him was unduly suggestive and precluded an independent basis for his in-court identification. The court held that this could not be an impermissibly suggestive identification procedure as no "confrontation" between the defendant and the witness occurred. A confrontation as defined by the United States Supreme Court in *Stovall v. Denno*[31] requires some form of physical contact engineered by law enforcement agencies or the prosecution. Absent an unduly suggestive pre-trial procedure, the question of the witness' independent basis for the in-court identification is never reached.

The Indiana Supreme Court found no substantial likelihood of misidentification flowing from a confrontation between the defendant and a witness at an in-court deposition. *Henson v. State*[32] suggested that the trial court should have granted defendant's motion to absent himself from counsel's table when no prior identification by the witness had been made. The serious courtroom atmosphere, testimony given under oath, and prior meetings with the defendant where the witness was not under stress provided an objective basis for her identification of Henson at trial.

C. Confessions and Admissions

1. Voluntariness.—In *Works v. State*,[33] the Indiana Supreme Court considered and rejected application of a per se rule of inadmissiblity to statements made during a custodial interrogation where the defendant had previously elected to remain silent. Im-

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(1975). *See also* Carmon v. State, 349 N.E.2d 167 (Ind. 1976); Vicory v. State, 262 Ind. 376, 315 N.E.2d 715 (1974).

[28]356 N.E.2d 204 (Ind. 1976).

[29]*See* United States v. Wade, 388 U.S. 219 (1967); Winston v. State, 263 Ind. 8, 323 N.E.2d 228 (1975). *See also* Edwards v. State, 352 N.E.2d 730 (Ind. 1976) (line-up held two hours after robbery and second line-up held a "few days" later without the presence of counsel in violation of *Wade-Gilbert* rule did not preclude an in-court identification based on observation of the defendants during the crime).

[30]*See* Stovall v. Denno, 388 U.S. 293 (1967).

[31]*Id.*

[32]352 N.E.2d 746 (Ind. 1976).

[33]362 N.E.2d 144 (Ind. 1977).

mediately after being placed under arrest, the defendant was advised of his constitutional rights, which included advisement of his right to remain silent.[34] To this the defendant replied that he understood his rights and had no statement to make. Works was again advised of his rights after being taken from his cell to an interrogation room upon his request to "talk to someone." Although he refused to sign a written waiver on that occasion, he spontaneously volunteered certain incriminating information and responded to questions when asked by a police detective. Works had been in custody eight hours when he was again removed from his cell, taken to an interrogation room, and read a statement of his rights for the third time, whereupon he signed a waiver form and made a full confession.

As the record was devoid of evidence concerning the circumstances surrounding the final interrogation, the only question before the court was the effect of the defendant's initial exercise of his right to remain silent. Works' contention that his decision to stand mute was an absolute bar to the admissiblity of any subsequently given confessions was summarily rejected. The court held that the determination of voluntariness must be made from the totality of circumstances.[35] The majority opinion intimated that once a person has been advised of his rights and chosen to remain silent it would be improper for the police to reopen an interrogation on the same crime, notwithstanding a reiteration to the defendant of his constitutional rights.[36] The eight-hour period of detention during which Works was not taken before a magistrate was not discussed by the court, presumably because it was not raised on appeal.

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[34]No challenge was made to the timing or adequacy of the warnings given. Failure to give each and every one of the warnings specified in *Miranda*, *see* discussion in note 13, *supra*, may not be fatal where there is no resulting harm. *See* Cooper v. State, 158 Ind. App. 82, 301 N.E.2d 772 (1973) (failure to advise of the right to court appointed counsel where the defendant was not an indigent).

[35]Johnson v. State, 250 Ind. 283, 235 N.E.2d 688 (1968), articulated the standard for determining voluntariness: "[W]hether under all the attendant circumstances, the confession was free and voluntary, freely self-determined, the product of a rational intellect and a free will, and without compulsion or inducement of any sort, or whether the accused's will was overborne at the time he confessed." *Id.* at 293, 235 N.E.2d at 694.

[36]Although the court cited the 1975 Supreme Court decision in Michigan v. Mosley, 423 U.S. 96 (1975), as contrary to a rule of per se inadmissibility of confessions made after an election to remain silent, there is a crucial factual distinction between *Mosley* and the instant case. Mosley asserted his right to remain silent on the original charge. He was readvised and interrogated on a *different* offense, to which he confessed. *Mosley* held that while in custody a suspect's right to terminate questioning on a specific offense must be "scrupulously honored." *Id.* at 104. For further discussion on this point, *see* Wilson, *Criminal Law and Procedure, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 174, 180-86 (1974).

The criteria for voluntariness are the controlling factors in determining the admissibility of spontaneous or unsolicited statements. The defendant in *Ortiz v. State*[37] surrendered himself to the police and volunteered information he believed to be exculpatory. The Indiana Supreme Court held that where there is no interrogation the presumption of involuntariness that arises out of a custodial situation is absent. The defendant's mistaken belief that the content of his statements was exculpatory did not render it involuntary as he was advised of his right to the assistance of counsel to help him make that determination. In this context, the state's burden is fulfilled by showing beyond a reasonable doubt that the police conduct was not excessive, unnecessary, or unreasonable.[38]

2. Unlawful Detention.—A major decision by the Indiana Supreme Court further explored the relationship between the requirements of *Miranda* and the constitutional protections embodied in the fourth and fifth amendments.[39] A confession made by the defendant after sixty-eight hours of detention without being taken before a magistrate and without proper advisement of his right to court appointed counsel was the subject of *Williams v. State.*[40] The defendant's arrest was predicated on unsworn and uncorroborated statements made to a Gary police officer by two persons who had witnessed the planning of a robbery and murder. The officer testified that he did not try to obtain a warrant for the defendant's

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[37]356 N.E.2d 1188 (Ind. 1976).

[38]The constitutionality of the Indiana statute setting forth the grounds for suppressing a confession obtained by inducement has not been challenged. IND. CODE § 35-1-31-5 (1976) provides: "The confession of a defendant made under inducement . . . may be given in evidence against him, except when made under the influence of fear produced by threats or by intimidation or undue influences; but a confession made under inducement is not sufficient to warrant a conviction without corroborating evidence."

[39]"Frequently . . . rights under the [fourth and fifth] amendments may appear to coalesce since 'the "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment.'" Brown v. Illinois, 422 U.S. 590, 601 (1975) (quoting Boyd v. United States, 116 U.S. 616, 633 (1886)).

Interplay between these two amendments and the exclusionary rules developed to effectuate their protections also arises in the context of a search consented to by a defendant while in custody, *see* Kerr, *Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 166-68 (1975), as well as in the context of unsolicited confessions or admissions. *See* the discussion of Works v. State at notes 33-36, *supra*. Pre-trial identifications, which comply with the right to counsel afforded by the sixth amendment, may be violative of fundamental due process and invoke the exclusionary provisions required by the fifth amendment. Stovall v. Denno, 388 U.S. 293 (1967).

[40]348 N.E.2d 623 (Ind. 1976).

arrest and did not take Williams before a magistrate immediately after his arrest because he did not have "probable cause to file a case." Williams was read an incomplete version of his rights upon his arrest and again the following morning when he was questioned. He refused to make a statement when questioned together with two co-conspirators and the two witnesses who, in his presence, agreed to make second statements. On the third day of detention he agreed to take a lie detector test after which he reaffirmed his election to remain silent. William's first confession was given that same day after he was informed that the lie detector test showed he had lied and that a co-conspirator had confessed. A second hand-written confession was obtained after another twenty-four hours of detention.

The court first found the sixty-eight hour delay in taking Williams before a magistrate to be a per se violation of the fourth amendment and Indiana statutes.[41] Reserving the question of whether delay beyond the six-hour statutory period renders a confession inadmissible as a matter of law in Indiana,[42] the court stated that it should at least alert the trial court to the "probable illegality" of the detention. A confession that is preceded by an illegal arrest or detention is subject to scrutiny under the fifth amendment. If found to be voluntary under the requirements of *Miranda*,[43] it is subjected to a second inquiry under the fourth amendment to determine if it was induced by the continuing effects of unconstitu-

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[41]IND. CODE § 35-1-21-1 (1976) permits the arrest and detention of a suspect until a legal warrant can be obtained. A complementary provision reads:

> [A] confession made or given by a person . . . while such person was under arrest or other detention in the custody of any law enforcement officer or law enforcement agency, shall not be inadmissible [in a criminal prosecution] solely because of the delay in bringing such person before a judge if such confession is found by the trial judge to have been made voluntarily . . . and if such confession was made or given by such person within six hours immediately following his arrest or other detention:
>
> Provided, that the time limitation contained in this section shall not apply in any case in which the delay in bringing such person before a judge beyond such six-hour period is found by the trial judge to be reasonable, considering the means of transportation and the distance to be traveled to the nearest available judge.

IND. CODE § 35-5-5-3 (1976).

[42]*See* Apple v. State, 158 Ind. App. 663, 304 N.E.2d 321 (1973) (period of delay is only one factor to be considered); Crawford v. State, 156 Ind. App. 593, 298 N.E.2d 22 (1973) (seemingly contrary in its holding that a confession was admissible because it was given within the six-hour period). For further discussion of this issue, *see* Kerr, *1974 Survey*, *supra* note 22, at 154.

[43]*See* Brown v. Illinois, 422 U.S. 590 (1975). In *Brown*, the Supreme Court followed its 1963 decision in Wong Sun v. United States, 371 U.S. 471 (1963), where the taint of an illegal arrest was dissipated by the lawful arraignment, release from custody, and passage of several days preceding Wong's confession.

tional custody. The court explicitly adopted the standard of voluntariness and the test for determining that the confession "was sufficiently an act of free will to purge the primary taint"[44] set forth by the United States Supreme Court in *Brown v. Illinois.*[45] The four relevant factors are: (1) Whether the individual was informed of his rights as required by *Miranda,*[46] (2) the temporal proximity of the arrest and confession, (3) the presence of intervening circumstances, and (4) particularly, the purpose and flagrancy of the official misconduct.[47] The majority went on to discuss the reasons necessitating a magistrate's review of the factual justification for an arrest or continued detention. Adopting the language of the United States Supreme Court in *Gerstein v. Pugh,*[48] the court indicated that an officer's on-the-scene assessment of probable cause is legally sufficient to justify arrest and detention for the brief period necessary to take the administrative steps incident to an arrest. This is contrary to the line of Indiana cases that have suggested that an arrest warrant is required if it is practicable for a warrant to be obtained.[49]

D. Assistance of Counsel

1. Right to Counsel.—Wallace v. State[50] is the first Indiana case to attempt to reconcile the seemingly antithetical sixth amendment rights to self-representation[51] and assistance of counsel at trial. In *Wallace,* the defendant sought to represent himself but requested the presence of an attorney at trial. The trial court refused to allow court appointed counsel to assist the defendant if he chose to proceed in his own behalf. In reversing the conviction, the court held

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[44]348 N.E.2d at 627 (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963)).

[45]422 U.S. 590 (1975).

[46]Williams was not informed of his right to court appointed counsel nor was there any explanation of his rights that might have clarified this right. *See also* Franklin v. State, 262 Ind. 261, 314 N.E.2d 742 (1974). The court further implied that an officer's knowledge that no means were available for providing court appointed counsel at this stage would render this inadequate. 348 N.E.2d at 629. *See also* Pirtle v. State, 323 N.E.2d 634 (Ind. 1975).

[47]The same police procedures employed by the Gary police in the instant case were recently condemned and barred by an order of the United States District Court for the Northern District of Indiana in Dommer v. Hatcher, 427 F. Supp. 1040 (N.D. Ind. 1975).

[48]420 U.S. 103 (1975). *See also* Kendrick v. State, 325 N.E.2d 464 (Ind. Ct. App. 1975).

[49]Stuck v. State, 255 Ind. 350, 264 N.E.2d 611 (1970); Throop v. State, 254 Ind. 342, 359 N.E.2d 875 (1970); Bryant v. State, 157 Ind. App. 198, 249 N.E.2d 200 (1973). For a discussion of these cases, *see* Kerr, *1974 Survey,* note 22 *supra,* at 138-42.

[50]361 N.E.2d 159 (Ind. Ct. App. 1977), *transfer denied,* 366 N.E.2d 1176 (Ind. 1977) (Givan, C.J., Pivarnik, J., dissenting).

[51]U.S. CONST. amend. VI; IND. CONST. art. 1, § 13. *See* Faretta v. California, 422 U.S. 806 (1975); Illinois v. Allen, 397 U.S. 337 (1970).

that the right to counsel is a fundamental guarantee that cannot be knowingly or intelligently waived unless the defendant is advised of the nature, extent, and importance of that right and fully understands the consequences of his choice.[52] The trial court has the duty of making a determination upon the record that the defendant has properly waived his right to counsel.[53] The court reserved the issue of whether advisory counsel must be provided upon request of a defendant proceeding pro se.

2. Effective Assistance of Counsel.—No significant inroads were made into the strong presumption of competency that a defendant must overcome to demonstrate a denial of his right to the effective assistance of counsel.[54] The burden of showing by strong and convincing proof that his representation was so ineffectual as to render the proceedings a mockery of justice and shocking to the conscience of the reviewing court[55] was the standard applied to allegations of inadequate consultation time spent by counsel. Two Indiana appellate courts refused to equate minimal consultation time spent with the client to "mere perfunctory action" by the attorney without specific proof of harm caused by counsel's inattention such as the failure to obtain sufficient information to prepare a defense or the failure to prepare trial strategy and present a defense.[56] Consistent with the presumption of competency extended to trial and appellate counsel, matters of strategy and trial tactics were not sufficient to establish incompetency where counsel failed to preserve error in overruling a motion for discharge by neglecting to include a bill of exceptions in the record on appeal,[57] failed to subpoena a sole alibi

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[52]*See* Johnson v. Zerbst, 304 U.S. 458 (1938). *See also* Argersinger v. Hamlin, 407 U.S. 25 (1972).

[53]Johnson v. Zerbst, 304 U.S. 458, 465 (1938). Compare this with the duty of the trial court to make and preserve a record of the advisement of constitutional rights prior to accepting a guilty plea. IND. R. CRIM. P. 10.

[54]Greer v. State, 262 Ind. 622, 321 N.E.2d 842 (1975).

[55]Bucci v. State, 263 Ind. 376, 332 N.E.2d 94 (1975).

[56]"Minimal consultation with the client does not of itself render the representation merely perfunctory. Each case must be judged upon its own facts." Daniels v. State, 312 N.E.2d 890, 893 (Ind. Ct. App. 1974); Wynn v. State, 352 N.E.2d 493 (Ind. 1976) (consultation of less than one hour and failure to interview one state's witness). *See also* Castro v. State, 196 Ind. 385, 147 N.E. 321 (1925) (defendant did not know of the appointment of counsel until the morning of trial and defendant and counsel were not conversant in common language); Smith v. State, 353 N.E.2d 470 (Ind. Ct. App. 1976) (conferred with defendant twice, both times in court room).

[57]Parsley v. State, 354 N.E.2d 185 (Ind. 1976). The record contained the motion set out in full but did not include a transcript of the testimony given at the hearing, thereby precluding review except as to the sufficiency of the evidence to support the trial court's factual determination. *See also* Turner v. State, 259 Ind. 344, 287 N.E.2d 339 (1972).

witness,[58] failed to object to improper remarks of the prosecutor,[59] and elicited testimony from the defendant on direct examination of a sodomy conviction that had been vacated prior to the defendant's trial for rape.[60]

Potential conflicts of interest arising out of representation of joint defendants by court appointed counsel may deny a defendant his right to the effective assistance of counsel. *McFarland v. State*[61] held that the trial court must inquire into the nature of the conflicting interests. The vehicle to be utilized is the appointment of one attorney to each defendant for purposes of inquiry into the facts and possible theories of defense.

E. Criminal Rule 4—Speedy Trial

Delay caused by a defendant's failure to appear may not be chargeable to him where the trial court took no affirmative steps to notify him, and he had no actual notice of the scheduled hearing dates. *Wilson v. State*[62] held that a defendant in a criminal case does not waive his right to a speedy trial by failing to keep himself informed of the court's action or failing to object to the delay.[63] The defendant appeared for arraignment in April 1973, found a jury trial in progress, inquired of the clerk to determine when he would be arraigned, and was later advised by the judge that he would be notified. The defendant testified that he had resided at his family residence and maintained employment with the same employer up to

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[58]Loman v. State, 354 N.E.2d 205 (Ind. 1976).

[59]Wynn v. State, 352 N.E.2d 493 (Ind. 1976).

[60]Loman v. State, 354 N.E.2d 205 (Ind. 1976). The court did note the lessened effect of an evidentiary error where trial is by the court, and declined to find incompetency from a single error. *See* Blackburn v. State, 260 Ind. 5, 291 N.E.2d 686 (1973).

[61]359 N.E.2d 267 (Ind. Ct. App. 1977). *See also* Martin v. State, 262 Ind. 232, 240 n.3, 314 N.E.2d 60, 66 n.3 (1974), which sets out the suggested procedure to be followed where the attorneys conclude that the defendants do not have antagonistic defenses, and no conflict of interest is present.

[62]361 N.E.2d 931 (Ind. Ct. App. 1977).

[63]*Id.* at 934. As Wilson was unrepresented by counsel during this period, the court declined to decide if the duty of a party to a civil action to keep informed of the court's actions without notice would be imposed on a criminal defendant who is represented by counsel. Bryant v. State, 261 Ind. 172, 301 N.E.2d 179 (1973) (in addressing the six month rule of IND. R. CRIM. P. 4(A), charged the defendant with knowledge and acquiesence of a trial setting outside the time limits where her counsel had received notice).

See State *ex rel.* Wernke v. Superior Court, 348 N.E.2d 644 (Ind. 1976), where the court held the defendant to have acquiesced in the setting of an arraignment beyond the one-year period prescribed by Criminal Rule 4(C) where neither the defendant nor his counsel were present when the setting was made. Failure to object to the written notice prior to arraignment was deemed to be a waiver.

July 30, 1974, when his bondsman informed him that a warrant for his arrest for failure to appear was outstanding. He than appeared with counsel and was arraigned. On August 9, 1974, he moved for discharge pursuant to Criminal Rule 4(C),[64] which was denied, and trial was held in February 1975. The court of appeals held that merely making docket entries of scheduled appearance dates without an attempt to serve notice on the defendant did not satisfy the duty of the state to bring a defendant to trial within the time periods prescribed by statute and the dictates of due process.[65]

In *Cooley v. State*,[66] the defendant was chargeable with the delay caused by his incarceration in another jurisdiction under subdivision A of Criminal Rule 4(C).[67] The court held that the defendant was not entitled to the operation of Criminal Rule 4(B) as he was not being held in jail under an "indictment or affidavit" charging an Indiana offense.[68] His claim that the state's knowledge of his apprehension and sentencing in Illinois and its failure to procure his temporary return for trial violated his constitutional guarantees of a speedy trial was rejected as no prejudice was shown.[69] *Maxey v. State*[70] held that the six-month period provided in Criminal Rule 4(A)[71] begins to run anew with the filing of a new indictment or af-

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[64]IND. R. CRIM. P. 4(C) as it existed prior to the 1974 amendments, provided: "No person shall be held by recognizance to answer an indictment or affidavit, without trial, for a period embracing more than one year continuously from the date on which a recognizance was first taken therein, but he shall be discharged. . . ."

A violation of the rule is to be determined on the basis of the content of the rule that was applicable when the operative events occurred. State v. Moles, 337 N.E.2d 543, 550 (Ind. Ct. App. 1975). *See also* Moreno v. State, 336 N.E.2d 675 (Ind. 1975).

[66]U.S. CONST. amend. VI; IND. CONST. art. 1, § 12.

[66]360 N.E.2d 29 (Ind. Ct. App. 1977).

[67]IND. R. CRIM. P. 4(C) provides:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar . . . .

[68]IND. R. CRIM. P. 4(B) as it existed prior to the 1974 amendments, provided: "If any defendant held in jail on an indictment or affidavit shall move for an early trial, he shall be discharged if not brought to trial within fifty (50) judicial days . . . ."

[69]360 N.E.2d at 32-33. *See* Barker v. Wingo, 407 U.S. 514 (1972); Smith v. Hooey, 393 U.S. 374 (1969); Hart v. State, 260 Ind. 137, 292 N.E.2d 814 (1973). *See also* Stewart v. State, 354 N.E.2d 749 (Ind. Ct. App. 1976).

[70]353 N.E.2d 457 (Ind. 1976).

[71]IND. R. CRIM. P. 4(A) provides: "No defendant shall be detained in jail on a charge, without a trial, for a period in aggregate embracing more than six (6) months from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge (whichever is later) . . . ."

fidavit.[72] The court held no prejudice was shown where the state dismissed the indictment on the day of trial to avoid the sanctions for failure to respond to the defendant's notice of alibi.[73]

F. Discovery

Expansion of the techniques and procedures for defendants obtaining discovery in a criminal action has received much attention during this survey period and was accompanied by the Indiana Supreme Court's clarification of its 1974 holding in *State ex rel. Keller v. Criminal Court*[74] with respect to the discretion of the trial court in limiting use of these methods.[75] In *Murphy v. State*,[76] the defendant filed a timely motion to depose the state's witnesses, which was denied after oral argument. The Indiana Supreme Court ordered a new trial and emphasized the "right" of a defendant[77] to obtain discovery without a showing of necessity and imposed the burden on the state to seek a protective order upon a showing of a paramount interest in non-disclosure, undue burden, expense, or no legitimate defense purpose. Absent such a showing, the trial court's denial of the use of depositions for discovery purposes was arbitrary and an abuse of discretion. The supreme court further stated that a

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[72]353 N.E.2d at 461. The same rationale was applied to Criminal Rule 4(B) in Johnson v. State, 355 N.E.2d 240 (Ind. 1976). In *Johnson*, the defendant's first trial ended in a hung jury. He was required to file a new motion for an early trial, and the time limitation for holding trial ran from that date.

[73]353 N.E.2d at 460-61. IND. CODE § 35-5-1-3 (1976). The original indictment charging first degree murder stated an inaccurate date and the state would have been forced to offer evidence at trial of the occurrence on that date only. The court has no discretion granting a motion to dismiss pursuant to IND. CODE § 35-3.1-1-13 (1976) where cause is stated.

[74]262 Ind. 420, 317 N.E.2d 433 (1974).

[75]The clarification in *Murphy* went only to the first prong of the *Keller* decision, regarding the "right" of a defendant to obtain discovery. The second prong of the *Keller* decision was directed at reciprocity in the exchange of information between the defendant and the state. This aspect of *Keller* has yet to receive definitive treatment by the appellate courts and significant questions as to its procedural application remain unanswered. For further discussion of this point, *see* Wilson, *1976 Survey*, *supra* note 36, at 187-89.

[76]352 N.E.2d 479 (Ind. 1976).

[77]The existence of a "right" to obtain discovery is not wholly resolved as the court relied on Antrobus v. State, 253 Ind. 420, 254 N.E.2d 873 (1970), a pre-*Keller* decision that limited a defendant's pre-trial access to transcriptions of grand jury testimony by requiring their production upon defense motion only after the witness has testified on direct examination. The court referred to *Antrobus* in its discussion of the defendant's "rights" to discovery and the inherent authority of the trial court to provide the means. This may indicate that the precedential value of this case rests on its delineation of the right to discovery rather than the procedures to be used. For further discussion of this issue, *see* note 75 *supra*, *and* Wilson, *1976 Survey*, *supra* note 36, at 186-87.

criminal defendant need not first obtain a court order but may take depositions of the state's witnesses by serving written notice on the prosecution, a procedure analogous to that provided in civil cases by Trial Rules 30 and 31.[78]

The court discussed and rejected the state's contention that because the verdict was supported by sufficient evidence found in testimony given by witnesses whom the defendant did not seek to depose, the trial court's erroneous denial of his petition was harmless error.[79] Echoing the concern it expressed in *Birkla v. State*[80] with respect to denying a defendant access to potentially exculpatory or mitigating evidence, the court refused to discount the potential prejudice resulting from complete denial of legitimately discoverable material even in the face of seemingly irrebuttable evidence of guilt. The significance of the *Murphy* decision lies in its treatment of discovery as a right afforded a criminal defendant which may be limited or restricted only in response to a compelling need demonstrated by the state. *Murphy* establishes the holding in *Keller* as a doctrinal precedent that not only creates procedural rights but also sets out the test to be applied in balancing those rights against competing interests of the state.[81] The requirement that the trial court support its denial of defense requested discovery by findings of fact sufficient to warrant constraint of a defendant's "rights" underscores the mandatory nature of the disclosure provisions in *Keller*.

The court's express determination that *Keller* and *Carroll v. State*[82] would supersede section 35-1-31-8 of the Indiana Code as definitive rulings on depositions in criminal cases can be reconciled with recent appellate decisions that upheld restrictions on a defendant's access to certain classes of discovery. In *Marlett v. State*,[83]

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[78]The court expressly upheld the incorporation of the techniques of discovery found in the Indiana Rules of Trial Procedure to criminal cases through Rule 21 of the Rules of Criminal Procedure, which provides: "The Indiana rules of trial and appellate procedure shall apply to all criminal appeals so far as they are not in conflict with any specific rule adopted by this court for the conduct of criminal proceedings."

[79]*See* United States v. Harris, 542 F.2d 1283 (7th Cir. 1976) (not reversible error unless shown to be prejudicial to the substantial rights of the defendant).

[80]263 Ind. 37, 323 N.E.2d 645 (1975). The court upheld the conviction even though the prosecutor had destroyed a tape recording of a conversation between the defendant and his wife after viewing it for exculpatory evidence but cautioned that the state bears a heavy burden to disprove prejudice where evidence is destroyed before advising defense counsel of its existence.

[81]352 N.E.2d at 481-82.

[82]263 Ind. 696, 338 N.E.2d 264 (1975). *Carroll* applied Trial Rule 32 of the Indiana Rules of Civil Procedure, which governs the use of depositions in criminal cases, while *Keller* specifically incorporated Trial Rules 30 and 31. For further discussion, *see* Kerr, *1975 Survey*, *supra* note 39, at 160-62.

[83]348 N.E.2d 86 (Ind. Ct. App. 1976).

the Second District Court of Appeals dealt with a trial court's denial of the defendant's motion to produce transcriptions of grand jury testimony of the state's witnesses where no pre-trial discovery of these statements had been sought. The defense motion was first made at the conclusion of direct examination after counsel's preliminary questions had established that the witnesses had testified before the grand jury. The court upheld the restrictions on pre-trial discovery of these statements set out in *Antrobus v. State*[84] but refused to further restrict their disclosure by requiring the defendant to request their transcription and production prior to the witness' testimony at trial. The *Marlett* court, while referring to *Keller* in the context of the trial court's jurisdiction or discretion to grant such a pre-trial request, relied upon the 1975 Indiana Supreme Court decision in *Morris v. State*[85] as establishing the requisite procedures a defendant must follow to preserve his "right" to production of grand jury testimony where no pre-trial order is sought, or where it is denied.[86] Limitations on the timing of a defendant's access to transcriptions of grand jury testimony might be justified under the "balancing" doctrine of *Keller*, as clarified in *Murphy*, by a consideration of the specialized nature of these proceedings. The on-going nature of a grand jury investigation, the reliance on hearsay, and the frequent breadth of information illicited could support a finding of a paramount interest, of the possibility of a fishing expedition, or of the harassment of witnesses[87] sufficient to justify restricting a criminal defendant's access to and use of this testimony.

In *Gutowski v. State*,[88] the defendant was deemed to have waived his pre-trial discovery rights by failing to conform to the time limitations contained in the court's order that permitted depositions but which denied his request that the state's witness answer written interrogatories.[89]

The Third District Court of Appeals, while adopting the position that a defendant's right to discovery was subject only to the limited discretion of the court where the state showed a paramount interest, appropriately found that the defendant's lack of diligence in

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[84]253 Ind. 420, 254 N.E.2d 873 (1970).

[85]352 N.E.2d 705 (Ind. 1976).

[86]348 N.E.2d at 88. Trial in both *Morris* and *Marlett* was held prior to the decision in *Keller*. The decisions in these cases may reflect an unwillingness to apply the mandatory provisions of *Keller* retroactively. For further discussion of this point, *see* Wilson, *1976 Survey*, *supra* note 36, at 187.

[87]*See* Amaro v. State, 251 Ind. 88, 239 N.E.2d 394 (1968).

[88]354 N.E.2d 293 (Ind. Ct. App. 1976).

[89]*Id.* at 296-97. In Banks v. State, 351 N.E.2d 4 (Ind. 1976), the court suggested that a pre-trial discovery order should fix a day certain for production with exclusion of the evidence at trial as the penalty for non-compliance. *Id.* at 14.

pursuing his rights constituted a waiver.[90] The propriety of serving written interrogatories or written questions during deposition of a witness in a criminal case was discussed in dicta as being within the discretion of the trial court where necessary to provide the defendant a full and fair hearing.[91] The appropriateness of the use of interrogatories by a defendant was expressly sanctioned by the Third District Court of Appeals in *Hampton v. State.*[92] The court held that the state, when responding to a pre-trial notice of alibi[93] where time is not of the essence, need only specify the date and place the offense was committed. A defendant desiring a precise specification of time should avail himself of an interrogatory.[94]

G. Conduct of the Trial Court

1. Local Rules.—In *Dickson v. State,*[95] the defendant failed to move for suppression of an in-court identification twenty-four hours or more in advance of trial as required by the trial court's rules. The Indiana Supreme Court held that failure to observe local procedural rules may preclude a defendant from asserting constitutional claims only where extrinsic evidence establishes a deliberate attempt to circumvent the rules. The trial court must conduct a hearing to rule out the negligence of counsel or good cause for nonobservance before finding a waiver. The court questioned the validity of the separate divisions of the Marion County criminal court adopting nonconforming rules of practice in light of the statutory provision for adoption of local rules by the general term.[96]

2. Change of Venue—Criminal Rule 12.—The relationship between the time limitations contained in Criminal Rule 12 were discussed in *Spugnardi v. State.*[97] The defendant filed a motion for change of venue from the judge within ten days of entering his plea but more than five days after the cause was set for trial. The court held the five-day limitation does not run from the initial trial setting

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[90]354 N.E.2d at 295.

[91]The court was careful to clarify the "right" to pre-trial discovery as not rising to the level of a constitutional guarantee contained in the due process clause. 354 N.E.2d at 295.

[92]359 N.E.2d 276 (Ind. Ct. App. 1977).

[93]IND. CODE § 35-5-1-2 (Supp. 1977).

[94]The Indiana Supreme Court concurred in Monserrate v. State, 352 N.E.2d 721 (1976) but suggested that a motion for greater specificity would more appropriately be directed at the state's response.

[95]354 N.E.2d 157 (Ind. 1976).

[96]*Id.* at 162 (citing IND. CODE § 33-9-9-6 (1976)). *See also* Anderson v. State, 359 N.E.2d 594, 595 (Ind. Ct. App. 1977).

[97]356 N.E. 2d 1199 (Ind. Ct. App. 1976).

as long as the trial date set was beyond the ten-day period.[98]

Variance between the venue alleged in a charge and the venue proved at trial is cured where a transfer has been ordered.[99] Section 35-1.1-2-6 of the Indiana Code[100] automatically amends the charging instrument. A variance is not fatal unless it is so substantial that it is likely to place a defendant in double jeopardy or mislead the defendant in preparation of his defense.[101]

3. Voir Dire.—A trial court rule allowing twenty minutes per side for oral examination of prospective jurors was found to be an abuse of discretion in *Anderson v. State.*[102] Trial before twelve jurors, one-third of whom had not been questioned on voir dire by the defendant or the State, was held to violate the defendant's right to trial before an impartial jury[103] and his concomitant right to participate in voir dire[104] to the extent reasonably necessary to an intelligent exercise of the right to peremptorily challenge prospective jurors.[105] The Indiana Supreme Court upheld a twenty-minute limitation on oral questioning by counsel where the trial court first conducted oral examination and permitted counsel to submit written voir dire questions in *Hart v. State.*[106] The state's failure to comply with a trial court order to submit written specifications on questions it would ask prospective jurors was held not to deny the defendant a fair trial or thwart the purpose of voir dire in *Cissna v. State.*[107]

4. Jury Challenges.—In a case of first impression, the Indiana Supreme Court held in *Stevens v. State*[108] that a defendant is not entitled to challenge a juror peremptorily after the jury is sworn. Upon discovery that a member of the panel (1) was a former co-

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[98]*Id.* at 1201. IND. R. CRIM. P. 12 provides that a timely motion for change of judge must be filed within ten days after a plea of not guilty has been entered. The motion will also be timely when filed within five days after setting the case for trial if the trial date is less than ten days from entry of the plea.

[99]Lewellen v. State, 358 N.E.2d 115 (Ind. 1976).

[100]IND. CODE § 35-1.1-2-6 (1976).

[101]"[T]he charge must be sufficiently specific so that . . . after jeopardy has attached, if a second charge is filed covering the same evidence, events or facts against the accused, the defendant will be protected." Madison v. State, 234 Ind. 517, 546, 130 N.E.2d 35, 48 (1955) (Arterburn, J., concurring).

[102]359 N.E.2d 594 (Ind. Ct. App. 1977).

[103]IND. CONST. art. 1, § 13.

[104]*See* Wasy v. State, 234 Ind. 52, 123 N.E.2d 462 (1955). IND. R. TR. P. 47(A) limits this right to the extent of eliminating direct interrogation of prospective jurors by providing for submission of written questions pertinent to and proper for testing their capacity and competence. Robinson v. State, 260 Ind. 517, 297 N.E.2d 409 (1973).

[105]Robinson v. State, 260 Ind. 517, 297 N.E.2d 409 (1973).

[106]352 N.E.2d 712 (Ind. 1976). Judge Buchanan, dissenting in *Anderson*, relied heavily upon *Hart* and White v. State, 263 Ind. 302, 330 N.E.2d 84 (1975).

[107]352 N.E.2d 793 (Ind. Ct. App. 1976).

[108]357 N.E.2d 245 (Ind. 1976).

worker of one of the defense witnesses, (2) had discussed the facts of the case with the witness, and (3) had failed to accurately respond to questions in voir dire relative to his familiarity or association with the parties or their witnesses, the defendant moved to set aside submission of the case to the jury. Using a procedure the supreme court had approved, the trial court conducted an examination of the juror to determine whether he had formed a conclusion as to the defendant's guilt, before overruling a challenge for cause. The court expressly overruled *Kurtz v. State*[109] in further upholding the trial court's refusal to entertain the defendant's peremptory challenge upon the motion to withdraw submission of the case to the jury.

5. Instructions.—*Feggins v. State*[110] addressed the question of the appropriate instruction to be given by a trial court in response to a juror's inquiry on the operation of post-conviction devices that reduce the length of a defendant's sentence. A member of the panel asked if a sentence of life imprisonment would mean imprisonment for the remainder of defendant's life. The court responded that some people are paroled and some are not, but that the issue was not for their consideration. The court upheld this instruction stating that it should only be given in response to a direct question by a juror or as an inadvertant introduction of the subject before the jury.[111] The court expressly overruled its previous decision in *Watts v. State*,[112] which permitted the court and the prosecutor to comment on parole, pardon, and good time where the jury determined the sentence.[113] Appropriate considerations for the jury in fixing the penalty are the mitigating or aggrevating circumstances of the crime rather than "personal characteristics" of the defendant, which might bear on future probation.[114]

H. Defenses

1. Entrapment.—At the close of 1976, the Indiana Supreme Court issued its opinion in *Hardin v. State*,[115] which revamped the defense of entrapment as a matter of law. The announced rule is in conformity with the new Indiana Penal Code, which closely tracks the approach developed in federal decisions.[116] The court expressly

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[109]145 Ind. 119, 42 N.E. 1102 (1896).

[110]359 N.E.2d 517 (Ind. 1977). *See also* Johnson v. State, 342 N.E.2d 1185 (Ind. Ct. App. 1977).

[111]359 N.E.2d at 522.

[112]226 Ind. 655, 82 N.E.2d 846 (1948), *rev'd on other grounds*, 338 U.S. 49 (1949).

[113]226 Ind. at 661, 82 N.E.2d at 849.

[114]359 N.E.2d at 523.

[115]358 N.E.2d 134 (Ind. 1976).

[116]IND. CODE § 35-41-3-9 (Supp. 1977) adopts the majority position found in Sorrells v. United States, 287 U.S. 435 (1932), and provides:

overruled *Walker v. State*[117] and its progeny to the extent that it requires the state to prove probable cause to suspect that the accused was engaged in illegal conduct. The dual inquiry to be made by the trial court is: First, did the law enforcement officials or their informants initiate or actively participate in the criminal activity, and secondly, did the accused have a predisposition to commit the crime.[118] A legitimate concern is raised by the concurring opinion[119] with reference to the burden of the state to prove that the police artifices only exposed a previously existing criminal design in the mind of the accused which he is willing and in a state of preparedness to carry out. It suggests that the majority opinion reduces this burden to a mere showing that the accused was not totally innocent in his attitude toward the proposition offered by the police and thereby vitiates the defense of entrapment as a matter of law.[120]

Two districts of the Indiana Court of Appeals have given retroactive application to *Hardin*. The Third District Court of Appeals refused to consider proof of probable cause to suspect that the accused was engaged in illegal activities in *Davila v. State*.[121] Justifying the concurring justice's concern in *Walker*, the court reviewed the sufficiency of the evidence to support the jury's determination that the defendant had "a sufficient propensity to commit the crime irrespective of police inducement," despite its finding that a prima facie case of inducement had been established.[122]

2. Jeopardy.—In *Hunter v. State*,[123] the First District Court of Appeals held that jeopardy does not attach to a proceeding in juvenile court that results in removal of a child from the parents' custody, so a subsequent criminal prosecution for child abuse and

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(a) It is a defense that: 1) the prohibited conduct of the person was the product of a law enforcement officer, or his agent, using persuasion or other means likely to cause the person to engage in the conduct; and 2) the person was not predisposed to commit the offense. (b) Conduct merely affording a person an opportunity to commit the offense does not constitute entrapment.

[117]255 Ind. 65, 262 N.E.2d 641 (1970).

[118]This second prong of the *Hardin* test of entrapment is retained from Walker v. State, 255 Ind. 65, 262 N.E.2d 641 (1970), and preserves the issue of the defendant's subjective state of mind in response to persuasion or inducement by police officials. *See* Gray v. State, 249 Ind. 629, 231 N.E.2d 793 (1967).

[119]358 N.E.2d at 137 (DeBruler, J., concurring).

[120]*Id.*

[121]360 N.E.2d 283 (Ind. Ct. App. 1977). An earlier decision of the third district acknowledged *Hardin* but applied the *Walker* test in effect at the time of the trial without discussion. *See id.* at 287 (Staton, J., concurring). *See also* Whitham v. State, 362 N.E.2d 486 (Ind. Ct. App. 1977) (citing *Davila* in support of retroactive application).

[122]360 N.E.2d at 286.

[123]360 N.E.2d 588 (Ind. Ct. App. 1977).

neglect[124] is not barred.[125] Jeopardy will attach only where the juvenile proceeding is adjudicatory in nature and has as its purpose the finding of guilt and assessment of punishment.[126] The court distinguished *Breed v. Jones*[127] in which the United States Supreme Court held that a juvenile jurisdiction waiver proceeding that required a finding that the juvenile committed the offense was a bar to subsequent trial in a criminal court. Relying on the stated legislative purpose, the court characterized the juvenile proceeding as civil in nature as it was conducted for the purpose of the safety and welfare of the child.[128] The same rationale was applied in *Walker v. State*[129] by the Indiana Supreme Court in finding that the waiver hearing required by section 31-5-7-14 of the Indiana Code[130] was not an adjudication on the merits of the offense charged.[131] The investigation required by the statute is not an adjudication of delinquency as contemplated by *Breed* but is merely determinative of the forum.

The United States Court of Appeals for the Seventh Circuit held that a defendant is placed in double jeopardy in violation of the constitutional prohibition where a state court grants a remand solely to permit the state to prove an essential element of the offense. In *Sumpter v. DeGroote*,[132] the Seventh Circuit granted the defendant's writ of habeas corpus where the Indiana Supreme Court affirmed her conviction in part for prostitution and remanded for additional findings rather than reversing and ordering a new trial.

3. Mental Condition.—(a) Insanity.—Several decisions by the Indiana Supreme Court and its appellate divisions this past year reviewed the effect of expert opinions on the jury's determination of a defendant's sanity. Inability of the experts to render an opinion on the defendant's sanity at the time of the offense,[133] inconclusiveness on the part of the expert witnesses,[134] and equivocation in their fin-

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[124]IND. CODE § 35-14-1-4 (1976 & Supp. 1977) is the criminal provision. Ch. 41, § 4, 1907 Ind. Acts 59 (repealed 1974) was the civil provision in force during the critical time period. This statute contains no punitive provisions.

[125]360 N.E.2d at 597.

[126]*Id.* at 596.

[127]421 U.S. 519 (1975).

[128]360 N.E.2d at 596. IND. CODE § 31-5-7-1 (1976) expressed the purpose of the act: "The principle is hereby recognized that children under the jurisdiction of the court are subject to the discipline and entitled to the protection of the state, which may intervene to safequard them . . . ."

[129]349 N.E.2d 161 (Ind. 1976). *See also* Seay v. State, 340 N.E.2d 369 (Ind. Ct. App. 1976), for a full discussion of this issue.

[130]IND. CODE § 31-5-7-14 (1976).

[131]349 N.E.2d at 166.

[132]552 F.2d 1206 (7th Cir. 1977). *See also Civil Rights: Feds May Try State Cases Again*, 63 A.B.A.J. 475 (1977).

[133]Johnson v. State, 358 N.E.2d 748 (Ind. 1977).

[134]Richardson v. State, 351 N.E.2d 904 (Ind. Ct. App. 1976).

dings brought out on cross examination[135] did not remove the issue from consideration by the jury. The courts in these cases reiterated the factual nature of the determination and the jury's legitimate consideration of lay testimony, acts surrounding the crime itself, and any other evidence of substantial probative value.[136]

(b) Incompetence.—The Indiana Supreme Court discussed in several opinions the evidence that may be considered by the trial court in determining the competency of the defendant to stand trial.[137] Evidence introduced at a post-conviction relief hearing was used to support a finding that the defendant had been competent to enter his plea of guilty in *Schuman v. State.*[138] The court sanctioned this retroactive determination of competency where a substantial body of psychiatric information was compiled prior to entry of the guilty plea and made a part of the record during the post-conviction relief hearing.[139] *Ludy v. State*[140] found no error in the trial court's reliance, in part, on the written report of an expert whose testimony was not heard by the judge who decided the issue of competency.[141] Testimony by the defendant given at the hearing on his competency and his demeanor were properly considered by the trial court in *Howard v. State.*[142] A trial court must conduct a hearing to determine a witness' competency to testify upon the defendant's request for a psychiatric examination of that witness. The witness in *McNeely v. State*[143] was originally a co-defendant. He testified at trial that: (1) The court had ordered him to be examined by a psychiatrist and undergo psychiatric treatment after his release on a reduced bond, (2) he had previously been in a mental institution, and (3) his mother told him he had a mental disorder. The trial court's determination of his competency to testify without a hearing was error, and the denial of defendant's petition for a psychiatric examination was an

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[135]Maxey v. State, 353 N.E.2d 457 (Ind. 1976). *See also* Johnson v. State, 358 N.E.2d 748 (Ind. 1977); Smith v. State, 354 N.E.2d 216 (Ind. 1976).

[136]Feller v. State, 348 N.E.2d 8 (Ind. 1976). *See also* Stamper v. State, 260 Ind. 211, 294 N.E.2d 609 (1973).

[137]The issue of competency may be raised prior to trial by a plea of insanity or a motion predicated upon the provisions of IND. CODE § 35-5-3.1-1 (1976). *See* Morris v. State, 263 Ind. 370, 332 N.E.2d 90 (1975).

[138]357 N.E.2d 895 (Ind. 1976).

[139]*Id.* at 898.

[140]354 N.E.2d 211 (Ind. 1976).

[141]The defendant stipulated to the court's consideration of evidence given at the first hearing; however, *Schuman* would provide authority for the trial court's use of medical reports in the absence of hearing the expert's testimony.

[142]355 N.E.2d 833 (Ind. 1976).

[143]349 N.E.2d 204 (Ind. Ct. App. 1976).

abuse of discretion in view of the court's knowledge of his mental condition.[144]

I. Sentencing

1. Entry of Judgment—Criminal Rule 11.—An entry of a "finding of guilty as charged and judgment is now by the court withheld" was found to be without authorization by statute or rule in *Robison v. State.*[145] Recognized as common practice in some courts, the Third District Court of Appeals held that the trial court loses jurisdiction to impose sentence when it deliberately postpones entry of judgment. As an entry of "judgment withheld" is neither a final order nor an appealable interlocutory order, the defendant must either compel the court to enter judgment or apply for a discharge.[146]

Discharge was sought by the defendant in *Taylor v. State*[147] for failure of the trial court to impose sentence within the thirty-day period prescribed in Criminal Rule 11. The court entered a judgment of conviction on July 25 and ordered a pre-sentence investigation report to be filed on July 31. Taylor appeared on that date without his counsel, who was ill, and no proceedings were held. The pre-sentence report was filed on August 22. The defendant filed his motion to dismiss and set aside the conviction on September 23, which was denied, and a nunc pro tunc entry of judgment purporting to relate back to the date of conviction was made on October 11. The Third District Court of Appeals held the nunc pro tunc entry to be of no effect.[148] The court then considered the remedy for non-compliance with Criminal Rule 11 where the court without good cause neglects to sentence, and the defendant did not procure the

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[144]*Id.* at 207. The Indiana Supreme Court held that ordering a psychiatric examination of a witness is a discretionary decision of the trial court in Reiff v. State, 256 Ind. 105, 267 N.E.2d 184 (1971); but where there is evidence that a witness suffers from a mental disorder, a psychiatric examination may be required for the determination of competency itself. Antrobus v. State, 253 Ind. 420, 435-36, 254 N.E.2d 873, 881 (1970), *discussed in* Chadwick v. State, 362 N.E.2d 483 (Ind. 1977) (co-defendant who withdrew insanity pleas after psychiatric examination determined competent to testify as witness after hearing without additional psychiatric examination).

[145]359 N.E.2d 924 (Ind. Ct. App. 1977). Statutory authorization for entry of "judgment withheld" is provided for first offenders under the Controlled Substances Act, IND. CODE § 35-24.1-4.1-13 (1976).

[146]IND. R. APP. P. 4(B). *See* Clanton v. State, 308 N.E.2d 726 (Ind. Ct. App. 1974). A motion for discharge may be inappropriate following the decision in *Taylor v. State*, 358 N.E.2d 167 (Ind. Ct. App. 1976).

[147]358 N.E.2d 167 (Ind. Ct. App. 1976).

[148]Such entries are to enable the court's records to speak the truth of what previously occurred and not to correct or supply an action not actually taken. Perkins v. Hayward, 132 Ind. 95, 31 N.E. 670 (1892).

delay.[149] Finding no constitutional right to have sentence imposed in timely fashion, the court rejected a discharge as disproportional to the trial court's error.[150] The court also rejected the suggestion of the dissenting judge that the sentence be reduced by the period of delay.[151] Concluding that where no deliberate attempt to indefinitely postpone sentence is shown the delay is not so great as to offend basic notions of fundamental fairness, the court held that the defendant's remedy is to compel the court to impose sentence.

2. Determination of Applicable Law.—Wolfe v. State[152] reaffirmed the general rule that the law in effect at the time the crime was committed is controlling where the legislature intended the amendment to increase its punitive provisions rather than to have an amelioratory effect. An exception to this general rule would be permitted where a statute is amended between the commission of the crime and the sentence if the amendment were "*truly amelioratory.*"[153] This principle was applied to the operation of the "good time"[154] statutes in *Jenkins v. Stotts.*[155] Computation of the credit given a defendant for good behavior during his incarceration was construed to extend the benefits of the new statutory computation scheme to benefit inmates who began serving their sentences under the prior system.[156]

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[149]Good cause is presumed where the record is silent on the reason for delay and the defendant makes no objection. Alford v. State, 155 Ind. App. 592, 294 N.E.2d 168 (1973). The defendant may not complain if he failed to object to sentencing set beyond the thirty days, but he bears no burden to seek compliance with the rule. Stout v. State, 262 Ind. 538, 319 N.E.2d 123 (1974).

[150]Prejudice reaching constitutional proportions might result from delay in the commencement of a sentence of incarceration. 358 N.E.2d at 171-72.

[151]A very intriguing discussion of the appellate court's inherent constitutional powers of review ensued in response to the alternative of revising the sentence. The Indiana Supreme Court has previously discussed its revisionary power under IND. CONST. art. 7, § 4, and declined to review sentences imposed on criminal defendants. Critchlow v. State, 346 N.E.2d 591 (Ind. 1976); Parker v. State, 358 N.E.2d 110 (Ind. 1976); Beard v. State, 323 N.E.2d 216 (Ind. 1975).

[152]362 N.E.2d 188 (Ind. Ct. App. 1977).

[153]*Id.* at 189 (citing Dowdell v. State, 336 N.E.2d 699, 702 n.8 (Ind. Ct. App. 1975)) (emphasis in original). The *Dowdell* court stated:

> If the legislature had enacted an ameliorative amendment, the application of which would be constitutionally permissible to persons who had committed the crime prior to its effective date, we would be willing to find a statement of legislative intent to apply the sentencing provisions of that ameliorative statute to all persons to whom such application would be possible and constitutional.

336 N.E.2d at 702 n.8.

IND. CONST. art. I, § 18 provides: "The Penal Code shall be founded on the principles of reformation, and not of vindictive justice."

[154]IND. CODE. §§ 11-7-6.1-1 to -8 (1976) (repealed effective Oct. 1, 1977 by Pub. L. No. 340, §§ 149-152, 1977 Ind. Acts 1533, 1610-11).

[155]348 N.E.2d 57 (Ind. Ct. App. 1976).

[156]*See* Pub. L. No. 43, § 1, 1974 Ind. Acts 181.

3. Determination of Penalty.—Two opinions by the Indiana Supreme Court attempted to eliminate the confusion among prior case decisions on the question of the trial court's authority to fix the penalty for an offense absent a determination of sentence in the jury verdict as required by statute.[157] In *Kelsie v. State*,[158] the defendant challenged the form of the verdicts provided the jury and the trial court's authority to impose sentence for second degree murder where the jury's verdict failed to state a penalty. The court held that the verdict forms, which contained no provision for the jury's assessment of penalty, were improper and that the trial court erred when it fixed the sentence rather than the jury. After a review of its recent decisions concerning erroneous sentencing by the trial court, the court returned to the reasoning of its 1926 opinion in *Palmer v. State*[159] and found the error to be harmless where the sentence invoked was the minimum that could have been imposed by the jury. By a logical extension of the holding in *Kelsie*, error in the trial court's assessment of the maximum penalty was rendered harmless in *Fultz v. State*.[160] The court directed the trial court to reduce the sentence to the minimum, thereby negating any prejudice accruing to the defendant from the jury's failure to set the penalty.[161] The court distinguished on their facts those cases where: (1) The verdict was void in its entirety because a misdemeanor verdict of guilty expressly stated that no penalty should be assessed,[162] (2) the verdict provided a greater penalty than the statute pro-

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[157]IND. CODE § 35-8-2-1 to -3 (1976) provides for jury sentencing with exceptions: "When the defendant is found guilty the jury, except in the cases provided for in the next two sections, must state, in the verdict, the amount of fine and the punishment to be inflicted . . . ."

Defendants in both cases were convicted of second degree murder for which the penalty is, alternatively, life imprisonment or imprisonment for no less than fifteen years and no more than twenty-five years. IND. CODE § 35-1-54-1 (1976). Brown v. State, 252 Ind. 161, 247 N.E.2d 76 (1969), held that the statute clearly requires the jury to state the sentence for second degree murder in its verdict.

Under the recently enacted Penal Code, all sentencing is done by the judge. IND. CODE § 35-50-1-1 (Supp. 1977). Nevertheless, case law under the old system will continue to be relevant as it is applicable to all offenses committed before October 1, 1977.

[158]354 N.E.2d 219 (Ind. 1976).

[159]198 Ind. 73, 152 N.E. 607 (1926).

[160]358 N.E.2d 123 (Ind. 1976).

[161]The court held that the error was not waived on appeal by Fultz's failure to object at the time of sentencing or by his failure to include it in his motion to correct errors. *Id.* at 125. *See also* Kleinrichert v. State, 260 Ind. 537, 297 N.E.2d 822 (1973). The proper procedure for seeking correction of sentence where the defendant has been harmed is provided by IND. R. POST-CONVICTION RELIEF 1, § 1(a)(3). Kelsie v. State, 354 N.E.2d 219, 226 (Ind. 1976).

[162]Kolb v. State, 258 Ind. 469, 282 N.E.2d 541 (1972) (the verdict on the felony count tried with the misdemeanor was not affected by the invalid verdict on the misdemeanor count).

vided,[163] (3) the verdict of guilty on one count stated the penalty provided for on the second count on which there was a finding of not guilty,[164] or (4) other ambiguities existed that rendered the verdict questionable as to which of two charged offenses the finding of guilt was to apply.[165]

4. Revocation of Probation.—Conviction for a subsequent offense is a statutorily created prerequisite for revocation of probation. *Hoffa v. State*[166] held that an arrest without an adjudication of guilt does not violate the terms of probation even where the trial court imposed the specific condition that the probationer not be arrested. Hoffa's probation was revoked following a hearing where evidence was admitted showing: (1) His arrest was reasonable and proper, (2) he had made two separate sales of marijuana to undercover agents, and (3) his arrest violated a term of his probation. The court held that the trial court's discretion in granting probation must be exercised within the statutory guidelines, which provide for revocation when "it shall appear that the defendant has violated the terms of his probation or has been found guilty of having committed another offense."[167] Reaffirming its decision in *Ewing v. State*,[168] the court held that where the additional conditions require the probationer to "refrain from criminal activity," "behave well," or "not engage in unlawful acts" a criminal conviction for such activity is required prior to probation revocation.[169]

5. Alternatives—Drug Abuse Treatment.—In its first review of section 16-13-6.1-16 of the Indiana Code,[170] the Indiana Supreme Court dispensed with the constitutional claims raised in *Hammer v. State*.[171] The defendant's petition for election of treatment as a drug abuser in lieu of prosecution was denied under the statutory provisions excluding persons who have committed violent crimes. The court dismissed the alleged violation of his right to equal protection on the grounds that the issues raised presented factual questions

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[163]West v. State, 228 Ind. 431, 92 N.E.2d 852 (1950).

[164]Crooks v. State, 256 Ind. 72, 267 N.E.2d 52 (1971).

[165]Martin v. State, 239 Ind. 174, 154 N.E.2d 714 (1958); Crotty v. State, 250 Ind. 312, 236 N.E.2d 47 (1968).

[166]358 N.E.2d 753 (Ind. Ct. App. 1977).

[167]IND. CODE § 35-7-2-2 (1976). A corollary to the trial court's power to grant probation is its authority to "impose such conditions as it may deem best" on the probationer. *Id.* § 35-7-2-1.

[168]310 N.E.2d 571 (Ind. Ct. App. 1974) (relying on the Indiana Supreme Court decision in State *ex rel.* Gash v. Morgan County Superior Court, 258 Ind. 485, 283 N.E.2d 349 (1972)).

[169]358 N.E.2d at 757.

[170]IND. CODE § 16-13-6.1-16 (1976).

[171]354 N.E.2d 170 (Ind. 1976).

that could not be resolved without a hearing giving the state the opportunity to defend.[172]

The Second District Court of Appeals upheld the trial court's denial of the defendant's petition for election of treatment in an opinion fraught with inconsistencies. In *Bezell v. State*,[173] the defendant had been enrolled in a drug maintenance program at the time of his arrest, had been drug-free for one month except for methadone, and stated that he had abused drugs. It was also charged that he had sixteen bindles of heroin on his person when arrested. Bezell argued that if a convicted individual states that he is a drug abuser and shows that he is not ineligible by reason of the nature of the present charge, his prior convictions, or his probation status, the court is required to offer him the opportunity to elect to submit to treatment in lieu of sentencing.[174] The court held that evidence of his drug-free status under the methadone program and the equivocal statement on his current status as a drug abuser rendered him ineligible.[175] The court's opinion casts doubt on the continued validity of *McNary v. State*[176] to the extent that it mandates the trial court to grant the defendant the opportunity to elect treatment and suggests a forthcoming reconsideration of the point.

VIII. Domestic Relations

Helen Garfield ***

A. Adoption—Termination of Parental Rights

1. Juvenile Court Proceedings.—The jurisdiction of juvenile courts to order permanent termination of parental rights was the

[172]*See* Hardin v. State, 254 Ind. 56, 257 N.E.2d 671 (1970).

[173]352 N.E.2d 809 (Ind. Ct. App. 1976).

[174]This contention is not without conflict. The Second District Court of Appeals held that the court may deny election where it determines that treatment would not rehabilitate the defendant. Glenn v. State, 322 N.E.2d 106 (Ind. Ct. App. 1975). The First District Court of Appeals held that a defendant had no right to treatment in lieu of imprisonment because he satisfied the statutory eligibility requirements. Reas v. State, 323 N.E.2d 274 (Ind. Ct. App. 1975). In Thurman v. State, 320 N.E.2d 795 (Ind. Ct. App. 1974), the Second District Court of Appeals limited the court's authority to suspend a sentence and order treatment to a period of six months after the defendant begins serving his sentence.

[175]352 N.E.2d at 811.

[176]156 Ind. App. 582, 297 N.E.2d 853 (1973).

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**Several important abortion cases were decided during the survey period. These decisions are discussed in Grove, *Constitutional Law, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 78 (1977).