VII. Criminal Law and Procedure

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A. Sentencing

Probably the most significant change in Indiana's criminal laws in recent years was the adoption of a new sentencing structure.[1] Under prior law, most sentences were for indeterminate periods of time, with the actual length of time served determined by the paroling authorities. Under the new code, the legislature has set presumptive sentences and has specified maximum amounts of time which may be subtracted because of mitigating factors or added as a result of aggravating factors.[2] Several decisions within the survey period have clarified the workings of the new sentencing system.

In determining what sentence to apply within the specified range of sentences, the trial court "shall consider the risk that the person will commit another crime, the nature and circumstances of the crime committed, and the prior criminal record, character, and condition of the person."[3] If the sentence imposed is the basic or presumptive sentence, the trial court is not required to state any reasons for imposing the sentence and the reviewing court will assume that the trial court considered these mandatory criteria.[4]

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[1] IND. CODE §§ 35-50-2-1 to -9 (Supp. 1980).

[2] A separate section spells out when and how the death penalty may be imposed. IND. CODE § 35-50-2-9 (Supp. 1980). Except where capital punishment is specifically referred to in this section, references to sentencing procedures refer to noncapital cases. For a discussion of the legislative history leading to adoption of the new structure, *see* Kerr, *Foreword: Indiana's Bicentennial Criminal Code, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 1, 27-34 (1976).

[3] IND. CODE § 35-4.1-4-7(a) (Supp. 1980).

[4] Gardner v. State, 388 N.E.2d 513 (Ind. 1979). The rule, requiring the court to give reasons when it sets sentences above or below the presumptive sentence but not when the presumptive sentence is imposed, is consistent with the statutory requirement:

> Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:
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> (1) a transcript of the hearing;

In *Gardner v. State*,[5] the defendant was convicted of murder and sentenced to a term of sixty years, consisting of the presumptive sentence of forty years plus the maximum twenty years allowed for aggravating circumstances.[6] The Indiana Supreme Court held that the scope of its review of the sentence was governed by the Rules for Appellate Review of Sentences: "2(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender."[7]

Finding no mitigating circumstances,[8] the *Gardner* court viewed as aggravating circumstances:[9] (1) A long history of deviant sexual

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(2) a copy of the presentence report; and

(3) if the court finds aggravating circumstances or mitigating circumstances, a statement of the court's reasons for selecting the sentence that it imposes.

IND. CODE § 35-4.1-4-3 (Supp. 1980).

[5]388 N.E.2d 513 (Ind. 1979).

[6]IND. CODE § 35-50-2-3(a) (Supp. 1980).

[7]388 N.E.2d at 517.

[8]IND. CODE § 35-4.1-4-7(b) (Supp. 1980) provides:

The court may consider these factors as mitigating circumstances or as favoring suspending the sentence and imposing probation:

(1) The crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so.

(2) The crime was the result of circumstances unlikely to recur.

(3) The victim of the crime induced or facilitated the offense.

(4) There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense.

(5) The person acted under strong provocation.

(6) The person has no history of delinquency or criminal activity, or he has led a law-abiding life for a substantial period before commission of the crime.

(7) The person is likely to respond affirmatively to probation or short-term imprisonment.

(8) The character and attitudes of the person indicate that he is unlikely to commit another crime.

(9) The person has made or will make restitution to the victim of his crime for the injury, damage, or loss sustained.

(10) Imprisonment of the person will result in undue hardship to himself or his dependents.

These criteria do not limit the factors the court may consider as mitigating. *Id.* § 35-4.1-4-7(d).

[9]*Id.* § 35-4.1-4-7(c) provides:

The court may consider these factors as aggravating circumstances or as favoring imposing consecutive terms of imprisonment:

(1) The person has recently violated the conditions of any probation, parole, or pardon granted him.

(2) The person has a history of criminal activity.

(3) The person is in need of correctional or rehabilitative treatment

behavior, (2) the heinous and aggravated nature of the offense,[10] (3) the destruction of evidence and hiding of the victim's body, and (4) the fact that a lesser sentence would depreciate the seriousness of the crime. The defendant argued that he did not have a serious criminal record[11] and that information he had given to the probation officer making the presentence report should not have been used against him in determining his sentence.[12] The supreme court found no fifth amendment violation in the trial court's use of the information volunteered by the defendant to the probation officer.[13] Regarding the record of prior criminal activity, the court held, "The presumption of innocence does not extend to the sentencing proceedings."[14] Thus, acts which did not lead to convictions, presumably even prior acquittals, could be used to show prior criminal activity.[15]

Griffin v. State[16] provides a useful discussion of the aggravation of a sentence based upon the defendant's prior criminal activity which had not been reduced to conviction. The defendant was convicted of armed robbery of a Hook's drugstore. He was given a twenty year sentence, ten years presumptive plus the maximum ten years for aggravating circumstances. The trial court found as aggravating factors the defendant's prior criminal activity and "the pattern of repeated criminal activity with a weapon involved which endangers the safety of the citizenry."[17] Griffin had previously been convicted of robbery, shoplifting, and uttering a forged instrument. The only violent crime, robbing another Hook's drugstore two days prior to the

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that can best be provided by his commitment to a penal facility.

(4) Imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime.

(5) The victim of the crime was sixty-five (65) years of age or older.

(6) The victim of the crime was mentally or physically infirm.

These criteria do not limit the factors the court may consider as aggravating. *Id.* § 35-4.1-4-7(d).

[10]After the victim rebuffed defendant's sexual advances, she was stabbed by defendant. The victim then begged defendant to take her to a hospital so that she could be treated and could continue to raise her children. Defendant rejected these entreaties, and the victim died.

[11]The defendant had never been convicted of a crime except for making obscene phone calls. He had been interviewed by police more than once in the past but had never been accused of other crimes.

[12]The opinion did not discuss the nature of defendant's sexual proclivities; presumably, the defendant divulged that information to the probation officer.

[13]388 N.E.2d at 520.

[14]*Id.* at 519.

[15]*Id.* at 519-20 (quoting Note, *A Hidden Issue of Sentencing: Burdens of Proof for Disputed Allegations in Presentence Reports*, 66 GEO. L.J. 1515, 1541-42 n.147 (1978)). *But see* text accompanying notes 22-25 *infra*.

[16]402 N.E.2d 981 (Ind. 1980).

[17]*Id.* at 984.

robbery for which he was tried, was introduced at the sentencing hearing. Although Griffin was never tried for the earlier robbery, the court held that "a sentencing judge does not err in considering a prior arrest or prior criminal activity which has not been reduced to a conviction."[18]

The *Griffin* court distinguished this situation from the one involved in *State v. McCormick*[19] in which the court held that a defendant in a capital murder trial would be denied due process of law if the same jury which heard evidence in the murder trial was allowed also to consider, at the penalty stage, the defendant's commission of an unrelated killing that did not result in a conviction.[20] In distinguishing these cases, the court in *Griffin* held that a more stringent procedural standard is required in capital cases than is required in non-capital cases and that the existence of a sentencing range in the non-capital cases gives the trial court greater discretion in determining what constitutes an aggravating circumstance.[21]

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[18]*Id.* at 983 (citing McNew v. State, 391 N.E.2d 607 (Ind. 1979); Gardner v. State, 388 N.E.2d 513 (Ind. 1979)).

[19]397 N.E.2d 276 (Ind. 1979).

[20]*Id.* at 281.

[21]402 N.E.2d at 984. The *McCormick* court examined the constitutionality of IND. CODE § 35-50-2-9(b)(8) (Supp. 1980). This section lists an aggravating circumstance which, if proven beyond a reasonable doubt, may lead to recommendation of the death penalty. Section 35-50-2-9 provides: "(a) The state may seek a death sentence for murder by . . . prov[ing] beyond a reasonable doubt [that] . . . (b) . . . (8) [t]he defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder." IND. CODE § 35-50-2-9 (Supp. 1980). The trial court had dismissed the count charging the other murder as an aggravating factor, reasoning:

> "Subsection (b)(8) allows the State to secure a conviction on a strong murder case, then seek the death penalty by proving a weak case before a jury which is undeniably prejudiced. This opens the door to death penalty recommendations upon a level of proof lower than proof beyond a reasonable doubt."

397 N.E.2d at 280 (quoting trial record).

The supreme court viewed subsection (8) as different from all of the other listed aggravating factors. *Id.* Subsections (1) through (6) related to the principal charge and were likely to require no additional evidence. Subsections (7) and (9) required proof of other past convictions which the court found "does not carry with it the emotional and prejudicial impact which would cause the death penalty to be imposed capriciously." *Id.* What was wrong with subsection (8), at least where the aggravating circumstance charged is commission of a murder wholly unrelated to the one for which the defendant has been convicted, was that it required the jury, which had just convicted the defendant, to attempt to consider fairly and impartially whether the defendant had committed another unrelated murder. *Id.* at 280-81.

Although there is much logic in the court's decision to give greater procedural protection to persons accused of capital crimes than to persons accused of other crimes, there is the possibility of similar prejudice in noncapital crimes. Although judges are expected to be less emotional than juries, is it certain that a judge, considering a defendant just convicted of a brutal assault, will be fair and impartial in

In *McNew v. State*,[22] the court announced that a sentencing judge may not consider a previous acquittal as an aggravating circumstance.[23] The conviction was nevertheless affirmed.[24] The trial court found as aggravating circumstances that the defendant had engaged in prior criminal activity, that a lower sentence would depreciate the seriousness of the crime, and that the crime was a serious one. Defendant's presentence report showed one prior conviction for armed robbery and several arrests. The arrests were for malicious trespass, curfew violations, a 1935 Beverage Act violation, and a traffic offense; most of these arrests occurred while the defendant was a juvenile. The majority found that the trial judge had heard evidence of the "serious nature of defendant's crime, especially regarding the extent of the injuries to [one of the victims]."[25] Thus, the court reasoned that it was justified in imposing an added sentence because of the seriousness of the crime.[26]

A well-reasoned dissent argued that the sentence should have been reduced to the presumptive thirty years. The dissent viewed two of the statutory criteria for aggravation, seriousness of the offense and whether imposition of a lesser sentence would depreciate the seriousness of the crime, as inappropriate justifications for imposing an aggravated sentence. The dissent stated:

> It is my opinion that the trial judge's addition of ten years to the Class A felony sentence is not adequately sup-

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determining as an aggravating circumstance whether that defendant had committed another similar brutal assault for which the defendant had not been tried or convicted? The same question arises if the crimes are ones to which society attaches particular opprobrium, for example, selling hard drugs to minors or beating helpless persons. Perhaps due process considerations require extension of the *McCormick* decision rather than its restriction to capital cases only.

[22]391 N.E.2d 607 (Ind. 1979).

[23]*Id.* at 612. In arriving at a forty year sentence for a Class A robbery, the trial judge indicated that he had considered an acquittal of a charge of armed robbery as part of the prior criminal activity of the defendant. The sentence consisted of a thirty year presumptive sentence plus ten years for aggravating circumstances. The supreme court agreed with the defendant's argument that considering this acquittal was improper:

> A not guilty judgment is more than a presumption of innocence; it is a finding of innocence. And the courts of this state, including this Court, must give exonerative effect to a not guilty verdict if anyone is to respect and honor the judgments coming out of our criminal justice system.

Id.

[24]391 N.E.2d at 612.

[25]*Id.*

[26]*Id.* Seriousness of injury to a victim may be a very appropriate criteria for mitigation or aggravation of a crime of which an element is causing injury to the victim. Such a reason should be indicated clearly by the trial court rather than guessed at by a reviewing court.

> ported by the record of his reasons for such action. I believe that the "seriousness of the crime" was taken into account when the Legislature fixed the penalty of thirty years. If the circumstances attendant to the commission of this particular crime rendered it more culpable than such crime generally, the judge should have related his reasons in detail sufficient to enable reviewing authority to assess them. Otherwise, the statute may be utilized to foster arbitrariness in sentencing.
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> Although set forth in the code as one of the criteria which may be considered as an aggravating circumstance, I believe the fourth enumerated cause "imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime," to be misplaced among such criteria, as a result of an error in legislative draftsmanship. By its terms, it is a basis or criteria for denying probation or reducing the sentence. It does not purport to be a reason for increasing the sentence.
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> . . . Therefore, although there may very well have been good and sufficient reasons in the mind of the trial judge for adding to the sentence, upon the record before us I cannot agree that such action was reasonable. The case probably illustrates the need for trial judges to be more specific and detailed in relating their reasons for increasing or reducing the sentences prescribed by the Legislature.[27]

The trial court in *Hinton v. State*[28] showed a reasonable evaluation of aggravating and mitigating circumstances in determining a sentence. However, the supreme court's discussion of the case included acceptance of some questionable criteria for aggravation. The defendant was convicted of voluntary manslaughter and sentenced to fifteen years in prison, five years based upon aggravating circumstances. The judge mentioned two factors he treated as mitigating, that the defendant had no prior adult criminal record and that he was eighteen years of age at the time of the crime. Balanced against these mitigating factors was the particularly heinous nature of the crime. The sentencing judge indicated: "'It seems to me that this was just a flat execution on your part. There's no other explanation for shooting a man in the head while he is lain prone before you. For that reason, the standard sentence is not adequate.'"[29]

The supreme court also indicated other grounds for upholding

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[27]391 N.E.2d at 613 (Prentice, J., dissenting).

[28]397 N.E.2d 282 (Ind. 1979).

[29]*Id.* at 285.

the sentence. First, the court noted that the judge considered the presentence report. However, because consideration of that report is required by statute,[30] this action is not a proper criterion for sentencing. Second, the court noted that the judge had considered that the "defendant was in need of correctional treatment that could best be provided by his commitment to a penal facility."[31] This consideration is another inappropriate criterion for determining aggravation of sentences.[32] There is little treatment provided at our penal facilities and many people question whether treatment is appropriate or possible. Unless there is specific treatment which a judge believes is appropriate for a convicted offender and which is best provided at a prison, this factor should not be used to justify increased incarceration or any incarceration at all. If the "treatment" that is available is that of keeping the person confined, it is obvious that such "treatment" can best occur in a prison. It is not appropriate, however, to increase a term of imprisonment on the rationale that the prison is most likely to keep the prisoner confined. Third, the court referred to the conclusion that imposition of a lesser sentence would depreciate the seriousness of the crime. If this is a valid criterion, then in practice it could be used indiscriminately to add years to the sentences of convicted persons, particularly of persons convicted of the most serious felonies.

In *Taylor v. State*,[33] the court of appeals found no impropriety in the trial court's use of a worksheet[34] to determine the sentence. The appellate court found that the judge had used both the worksheet and the presentence report[35] in calculating the sentence, and that the judge articulated adequate reasons to justify the sentence.[36] The defendant was convicted of attempted theft and was sentenced to a term of four years, two years presumptive and two years for aggravating circumstances. In justifying the sentence, the judge relied upon the meaningless phrases that the defendant could benefit from "commitment to a penal facility" and that a lesser sentence "would depreciate the seriousness of the crime."[37] In addition, the court

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[30]IND. CODE § 35-4.1-4-9 (1976).

[31]397 N.E.2d at 285.

[32]IND. CODE § 35-4.1-4-7(c)(3) (Supp. 1980).

[33]391 N.E.2d 662 (Ind. Ct. App. 1979).

[34]The worksheet was prepared by the Indiana Judicial Center (IJC) for use by Indiana judges.

[35]The presentence report included: (1) a diagnostic report, (2) a psychologist's evaluation, (3) a presentence investigator's evaluation, and (4) a summary of defendant's background. 391 N.E.2d at 664.

[36]*Id.*

[37]*Id.*

found that the defendant had a history of criminal activity, that he was twenty-one years of age, and that he showed no remorse.[38]

It is not clear why the court considered youth an aggravating factor. Perhaps the court theorized that young offenders are more likely to commit further offenses.[39] However, other judges have viewed youth as a mitigating factor,[40] presumably on the theory that young criminals are not yet hardened nor committed to a life of crime. Application of such contradictory criteria can hardly lead to uniformity of punishment or an appearance of fairness in sentencing. Making remorse a significant factor in sentencing will reward those who falsely show remorse and penalize those who, by insisting on their innocence, are not in a position to express remorse. If a sentence is being imposed for the criminal act, arguably, remorse should be irrelevant.

The worksheet factors used to assess the offender's danger to society appear generally to be appropriate and helpful to judges. The *Taylor* court assigned points for each prior felony or misdemeanor conviction as well as for each prior incarceration.[41] Points were also assigned if the offender was in custody or out on bail, parole, or probation at the time of the crime, or if the offender had previously had probation or parole revoked.[42] However, it is hard to understand why incarceration for a prior conviction leads to an assessment of additional points against the offender. Perhaps this method reflects the belief that a prior conviction which led to probation was not as serious as one which led to incarceration. This rationale, however, ignores the great disparities in sentencing practices from one judge to another which may account for whether a prior sentence actually has been served. A more logical but less likely rationale is that our prisons are so harmful to offenders that a person who has served a sentence is more dangerous to society than a person who has never been subjected to our correctional system.

In *Taylor*, points were subtracted if the offender made a realistic restitution agreement, if the offender was over twenty-five at the time of the first serious offense, or if the offender had been substantially law-abiding for the five years prior to the offense for which the sentence was to be imposed.[43]

The legislature may determine that a trial court may not sus-

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[38]*Id.*

[39]The IJC worksheet considers as a mitigating factor that the offender was at least twenty-five years of age upon committing his or her first serious offense.

[40]Hinton v. State, 397 N.E.2d 282 (Ind. 1979).

[41]391 N.E.2d at 663.

[42]*Id.*

[43]*Id.* at 663-64.

pend part or all of the sentence for certain crimes. The Indiana Supreme Court in *State v. Palmer*[44] reversed a trial court's determination that a statute[45] barring suspension of sentences for certain crimes was unconstitutional. The defendant was convicted of first degree burglary, for which the sentence at the time was a non-suspendable, indeterminate sentence of between ten and twenty years. The trial court nevertheless suspended the sentence and reduced it to 205 days less jail time already served, plus a probation term of five years. The supreme court determined that probation is a privilege granted exclusively by statute and that the lawmakers may "provide for the length of sentences for offenses and to regulate the power of courts to grant or deny probation as they see fit."[46] Under current Indiana criminal law, trial courts may not suspend any part of the sentence for a felony if the convicted person has a prior unrelated felony conviction or if the current conviction is for one of a long list of offenses.[47]

B. Right to Counsel

In *Brunson v. State*,[48] the court reaffirmed that the Indiana Constitution[49] establishes the right of persons accused of any crime to employ counsel.[50] This right to counsel must be provided for indigents at the state's expense.[51] Therefore, this state right is greater

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[44]386 N.E.2d 946 (Ind. 1979).

[45]IND. CODE § 35-7-1-1 (1976).

[46]386 N.E.2d at 949.

[47]IND. CODE § 35-50-2-2(a) (Supp. 1980).

[48]394 N.E.2d 229 (Ind. Ct. App. 1979).

[49]IND. CONST. art. 1, § 13 provides in part:

> In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

[50]394 N.E.2d at 231.

[51]The supreme court in Moore v. State, 401 N.E.2d 676 (Ind. 1980), stated "The guarantee of the right to be represented by counsel includes the right for an indigent defendant in a criminal prosecution to have counsel provided for him at state expense." *Id.* at 678. *Accord*, Frazier v. State, 391 N.E.2d 1192, 1194 (Ind. Ct. App. 1979).

The *Moore* court recognized several factors to be considered in determining a defendant's indigency:

> [T]he defendant does not have to be totally without means to be entitled to counsel. If he legitimately lacks the financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him. . . . The determination . . . is not to be made on a superficial examination of income and ownership of property but must be based on as thorough an examination of the defendant's total finan-

than the federal constitutional guarantee[52] which requires "only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[53]

The defendant in *Brunson* was convicted of resisting law enforcement and was sentenced to thirty days imprisonment and payment of a $100 fine for that misdemeanor.[54] Brunson argued on appeal that the trial court erred when it failed to advise him of his right to an attorney at the misdemeanor trial. There is no question that the Federal Constitution guarantees that a person accused of a crime has the right to employ an attorney on his or her own behalf.[55] Here, the defendant also had a right to appointed counsel if he was indigent because the trial court imposed a sentence of incarceration.[56] Although the *Brunson* opinion does not mention whether the defendant was indigent, the court must have been considering the provision of counsel to indigents when it indicated that Indiana has a constitutional guarantee of the right to counsel different from that provided by the Federal Constitution.[57]

The federal and state constitutional provisions regarding right to counsel both appear on their faces to apply to all criminal prosecutions. The *Brunson* court, however, held that "[u]nlike the federal constitutional guarantee, the provisions of Section 13 establish a right to counsel for all persons charged with a criminal misdemeanor, *regardless of whether the charge ultimately results in the misdemeanant's imprisonment.*"[58]

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cial picture as is practical. The record must show that the determination of ability to pay includes a balancing of assets against liabilities and a consideration of the amount of the defendant's disposable income or other resources reasonably available to him after the payment of his fixed or certain obligations. . . . The fact that the defendant was able to post a bond is not determinative of his nonindigency but is only a factor to be considered. . . . The court's duty to appoint competent counsel arises at any stage of the proceedings when the defendant's indigency causes him to be without the assistance of counsel.

401 N.E.2d at 678-79.

[52]U.S. CONST. amend. VI provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

[53]Scott v. Illinois, 440 U.S. 367, 374 (1979).

[54]He also was convicted of a felony, unlawful possession of a deadly weapon. That conviction was reversed for failure of the trial court to advise Brunson of his constitutional or statutory rights before the court accepted his guilty plea. 394 N.E.2d at 231-32.

[55]440 U.S. at 370.

[56]*Id.* at 373.

[57]394 N.E.2d at 231.

[58]*Id.* (emphasis added).

Some confusion exists over whether failure to advise a defendant electing to represent himself of the dangers and disadvantages of self-representation is per se reversible error. In *Shelton v. State*,[59] the defendant appealed from his conviction of three counts of forgery. Although the trial court had advised Shelton of his rights to assistance of counsel and to appointment of counsel if he was indigent, Shelton refused counsel and pleaded guilty. The court of appeals acknowledged that a defendant has the right to represent himself,[60] but it stated that the trial court has "'the serious and weighty responsibility . . . of determining whether there is an intelligent and competent waiver by the accused.'"[61]

In determining whether a valid waiver had occurred, the court considered that Shelton was aware of his right to counsel, was advised by the court about the nature of the charges and the consequences of the guilty plea, was forty-four years old, and had been a defendant in several prior, unrelated criminal prosecutions. Although the court of appeals deemed it the better practice for the trial court to advise the defendant of the advantages of representation, it found "failure to so advise [was] not per se reversible error. The determination of whether there [had] been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances . . . including the background experience and conduct of the accused."[62] Upon evaluation of the record, the court found that the facts and circumstances revealed that Shelton knowingly and intelligently waived his right to counsel.[63]

It is difficult to understand why these facts show a proper waiver of counsel. The knowledge of the right to counsel does not show a knowing waiver, although ignorance of the right obviously would preclude a knowing waiver. The judge's comments to the defendant about the charge against him and the consequences of his plea were not adequate substitutes for independent counsel. As the court acknowledged, Shelton's limited education weighed against a finding of proper waiver; his age appeared to be irrelevant. Shelton's previous trials for other offenses did not shed light upon his current waiver of counsel. Even without adopting a per se rule requiring advice about the advantages and disadvantages of pro se representation, the court, based on the facts presented, should have reversed the conviction because of inadequate waiver of counsel.

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[59]390 N.E.2d 1048 (Ind. Ct. App. 1979).

[60]Faretta v. California, 422 U.S. 806 (1975).

[61]390 N.E.2d at 1050 (quoting Johnson v. Zerbst, 304 U.S. 458, 465 (1938)).

[62]390 N.E.2d at 1051.

[63]*Id.*

Other Indiana appellate decisions have adopted the per se rule rejected by the *Shelton* court. In *McDandal v. State*,[64] the court determined that the defendant was not adequately informed of his right to counsel, by merely asking him if he needed an attorney;[65] nor could an effective waiver of that right be "inferred from a silent record."[66] Moreover, the court noted that "where . . . the defendant is allowed to proceed to trial without counsel, *the record must show that the defendant was expressly advised of both his right to counsel and the disadvantages of self-representation.*"[67]

C. Double Jeopardy and Lesser Included Offenses

In *Thompson v. State*,[68] the Indiana Supreme Court upheld a one to ten year conviction for entering with the intent to commit a felony.[69] The court rejected the argument raised by the defendant and the two dissenting justices,[70] that the maximum period for which the defendant could be imprisoned was five years. The rejected argument was based on *Heathe v. State*[71] in which the supreme court reduced a sentence for entering to commit a felony from ten to five years.[72] The *Thompson* court noted that Heathe had been convicted of entering with intent to commit a felony as a lesser included offense of second degree burglary;[73] that second degree burglary carried a maximum penalty of five years' imprisonment; and that *Heathe* simply ruled that it was unconstitutional[74] to sentence the defendant for a longer period under the lesser included offense of entering to commit a felony than would have been available had the defendant been convicted of the greater offense of second degree burglary.[75] In distinguishing *Heathe*, the court noted that Thompson was initially charged with first degree burglary;[76] that he had plead-

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[64]390 N.E.2d 216 (Ind. Ct. App. 1979).

[65]*Id.* at 217.

[66]*Id.* at 216.

[67]*Id.* at 217 n.2 (emphasis added). *Accord*, Wallace v. State, 361 N.E.2d 159 (Ind. Ct. App. 1977) ("At no time was he asked if he were aware he was waiving an important constitutional right or the possible consequences of such a decision on his part." *Id.* at 163).

[68]389 N.E.2d 274 (Ind. 1979).

[69]*Id.* at 278. IND. CODE § 35-13-4-5 (1976) (repealed 1977).

[70]389 N.E.2d at 278 (DeBruler, J., dissenting) (Prentice, J., concurring with dissent).

[71]257 Ind. 345, 274 N.E.2d 697 (1971).

[72]389 N.E.2d at 277. The statutory penalty for entry with intent to commit a felony is one to ten years' imprisonment. IND. CODE § 35-13-4-5 (1976) (repealed 1977).

[73]389 N.E.2d at 277. IND. CODE § 35-13-4-4(b) (1976) (repealed 1977).

[74]IND. CONST. art. 1, § 16.

[75]389 N.E.2d at 277-78.

[76]IND. CODE § 35-13-4-4(a) (1976) (repealed 1977). The distinction between first and

ed guilty to the lesser included offense of entering with intent to commit a felony; and that since the maximum penalty for first degree burglary is twenty years' imprisonment, the trial judge could properly sentence the defendant to ten years' imprisonment for the lesser offense of entering to commit a felony.[77]

The dissent rejected the majority's distinction between *Heathe* and *Thompson*. Instead, the dissent interpreted *Heathe* as holding that the sentence imposed for a lesser included offense may not exceed the sentence available for the greater offense regardless of whether the greater offense is charged or whether there has been an actual trial for the greater offense.[78] The dissent appeared to maintain that entering with the intent to commit a felony must always be considered as a lesser included offense of *second* degree burglary which carries a maximum penalty of five years' imprisonment. Therefore, the maximum penalty for entering to commit a felony should be five years' imprisonment regardless of whether the entering charge is based upon acts which constitute first or second degree burglary.

There were two court of appeal decisions[79] which applied the Indiana Supreme Court holding of *Elmore v. State*.[80] In *Elmore* the court ruled that, when evaluating whether multiple count prosecutions for crimes arising out of the same act violated double jeopardy,[81] the test to be applied was whether "'each [statutory] provision [charged] requires proof of an additional fact which the other does not.'"[82]

In *Pillars v. State*,[83] the court ruled that a Criminal Rule 4(C)[84] discharge of the defendant on a charge of assault with intent to kill[85]

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second degree burglary was based on the structure burglarized. First degree burglary involved entry into places of human habitation while second degree burglary involved entry into all other structures.

[77]389 N.E.2d at 278.

[78]*Id.* (DeBruler, J., dissenting).

[79]State v. Redmon, 390 N.E.2d 1044 (Ind. Ct. App. 1979); Pillars v. State, 390 N.E.2d 679 (Ind. Ct. App. 1979).

[80]382 N.E.2d 893 (Ind. 1978).

[81]*See* U.S. CONST. amend. V, made applicable to the states through U.S. CONST. amend. XIV.

[82]382 N.E.2d at 895 (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)). For a more detailed discussion of *Elmore*, *see* Mead, *Double Jeopardy Protection—Illusion or Reality?*, 13 IND. L. REV. 863 (1980); Raphael, *Criminal Law and Procedure, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 187, 187-89 (1980).

[83]390 N.E.2d 679 (1979).

[84]For a discussion of the court's interpretation of IND. R. CR. P. 4(C), *see* notes 168-91 *infra* and accompanying text.

[85]IND. CODE § 35-13-2-1 (1976 & Supp. 1980).

(count I) barred prosecution of the defendant for threatening to use a deadly or dangerous weapon[86] (count II) or for aiming a weapon[87] (count III).[88] Although the court acknowledged that the latter two offenses did not technically constitute lesser included offenses, it concluded that counts II and III "accused Pillars of committing the same criminal acts which the State alleged in support of the greater offense of assault with intent to kill";[89] that without proving the acts alleged in counts II and III the state would not have been able to prove the assault charge; and that "the principle of double jeopardy precludes more than one punishment"[90] in a case where the offenses charged "addressed the same harm arising from the defendant's act."[91]

Although both *Pillars* and *Elmore* involved the propriety of multiple-count prosecutions based upon the same criminal act, the *Pillars* court failed to correctly apply *Elmore*. By focusing on the fact that all of the counts arose from the same act, the court ignored the clear language of *Elmore*: "[T]he fact that the offenses stem from the same act merely informs us that there is a potential problem; it is not a solution to the problem. The ultimate focus is on the identity of the offenses, not on the identity of their source."[92] The court in *Pillars* did not even attempt to fit its analysis within the parameters of *Elmore*.

Rather than determining whether the prosecution for counts II and III was barred by the double jeopardy clause, the *Pillars* court simply cited cases decided before *Elmore*, ruled that the prosecution was barred, and referred to the "principle of double jeopardy" in a footnote.[93] The court failed to either distinguish *Elmore* or to reconcile *Pillars* with *Elmore*. Thus, although *Elmore* seems relevant to the decision in *Pillars*, that relevance cannot be discerned in the *Pillars*' outcome.

The ruling in *Pillars* can be contrasted with the result in *State v. Redmon*.[94] In *Redmon*, the court ruled that the defendant's guilty plea, for operating a motor vehicle while his license was suspended,[95] did not preclude a subsequent prosecution for operation of a motor

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[86]*Id.* § 35-1-79-1.

[87]*Id.* § 35-1-79-5.

[88]390 N.E.2d at 684.

[89]*Id.*

[90]*Id.* at 684 n.3 (construing McFarland v. State, 384 N.E.2d 1104, 1111 (Ind. Ct. App. 1979)).

[91]390 N.E.2d at 684 n.3.

[92]382 N.E.2d at 897.

[93]390 N.E.2d at 684 n.3.

[94]390 N.E.2d 1044 (Ind. Ct. App. 1979), *vacated* 396 N.E.2d 117 (Ind. 1979).

[95]IND. CODE § 9-1-4-52 (1976 & Supp. 1980).

vehicle by an habitual traffic offender.[96] The court, quoting *Elmore*, noted that while both offenses arose from the same act, the elements of the two offenses differed.[97] Although this result may seem harsh because the defendant is punished twice for the same act, the harshness is mandated by the holding in *Elmore*.

In *Brown v. State*,[98] a double jeopardy case involving reprosecution for the same offense, the court of appeals ruled that the defendant's double jeopardy rights were not violated when the defendant's absence from his first trial caused a mistrial and necessitated a second proceeding. Although neither the defendant's counsel nor the prosecutor wished to proceed with the first trial in the defendant's absence, the trial judge proceeded determinedly. The trial judge's zeal waned, however, upon discovering that the defendant's absence prevented the state's witnesses from sufficiently identifying the defendant to prove the state's case. The judge declared a mistrial and the defendant was reprosecuted following his arrest. The court of appeals noted that the defendant's voluntary absence created a "manifest necessity" for a mistrial.[99] Accordingly, the court ruled that the mistrial and reprosecution were permissible under relevant United States Supreme Court precedent.[100]

By so ruling, the court's analysis is deficient in two respects. First, the court overlooked the fact that both the trial judge and the defendant were at fault for the mistrial. Although the defendant's conduct prevented the completion of the trial, the judge's order that a jury be empaneled caused jeopardy to attach. Thus, one can argue, the conduct of the judge caused the mistrial, and therefore, the defendant should not have been reprosecuted.[101]

The court's second oversight was its failure to discuss the trial judge's decision to declare a mistrial rather than to grant a continuance. Although the court mentioned that there was nothing in the record to indicate that the trial judge considered any alternatives to

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[96]*Id.* § 9-4-13-14.

[97]390 N.E.2d at 1046. As noted by the court, a conviction for the operation of a motor vehicle by an habitual traffic offender (HTO) requires proof that the defendant was an HTO and that he operated the vehicle while a court order prohibiting operation was in effect. Conviction for driving with a suspended license deals only with the license suspension and not with whether a defendant is an HTO.

[98]390 N.E.2d 1058 (Ind. Ct. App. 1979).

[99]*Id.* at 1065.

[100]*Id.* The Court has consistently ruled that when there is "manifest necessity" for the declaration of a mistrial, the double jeopardy clause does not bar a retrial. Arizona v. Washington, 434 U.S. 497 (1978); Gori v. United States, 367 U.S. 364 (1961); and United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824).

[101]"Manifest necessity" cannot be created by errors of either the prosecutor or the judge. Crim v. State, 156 Ind. App. 66, 78, 294 N.E.2d 822, 830 (1973).

a mistrial, it hastily concluded that the defendant's continued absence from the proceedings justified the trial court's decision to grant a mistrial.[102] As wrong as the defendant's conduct may have been, however, the court's lack of analysis made it difficult to determine how the trial judge discharged the duty to determine that a mistrial was "manifestly necessary" or how the appellate judges fulfilled their obligation to "satisfy themselves that . . . the trial judge exercised 'sound discretion' in declaring a mistrial."[103]

In *Roddy v. State*,[104] the court of appeals analyzed when "lesser included offense" instructions should be submitted to a jury.[105] The court concluded that a trial court must first determine whether the lesser included offense is "necessarily included" in the offense with which the defendant is charged. A charge may be "necessarily included" if "by virtue of the legal definitions of the two offenses, it is impossible to commit the greater offense without first committing the lesser."[106] A charge may also be "necessarily included" if "the elements of the lesser offense, by virtue of the manner and means allegedly employed in the commission of the charged crime,"[107] are properly alleged in the charging instrument.

Upon determining that a lesser charge is "necessarily included,"[108] the trial court must then evaluate whether there is probative evidence which raises a serious dispute whether the defendant did indeed commit the elements which differentiate a lesser offense from a greater offense.[109] The court concluded that if there was no dispute

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[102]390 N.E.2d at 1064-65.

[103]Arizona v. Washington, 434 U.S. 497, 514 (1978).

[104]394 N.E.2d 1098 (Ind. Ct. App. 1979).

[105]Pursuant to IND. CODE § 35-1-39-2 (1976) (repealed 1977), a defendant "may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment or information." It appears that much of the court's holding in *Roddy* will apply to IND. CODE § 35-41-1-2 (Supp. 1980), which is the successor statute to § 35-1-39-2. Indeed, the court in *Roddy* indicated how its analysis would be affected by the passage of § 35-41-1-2. 394 N.E.2d at 1106 n.14.

[106]394 N.E.2d at 1106. These offenses were labelled "inherently included" lesser offenses.

[107]*Id.* at 1107. These offenses were labelled "possibly included" lesser offenses. Thus, a trial court must examine both the relevant criminal statutes and the charging instrument to determine if an offense is a "necessarily included" lesser offense. Likewise, the trial court must determine "[w]hether a conviction of the charged offense requires proof of an element additional to those which comprise the lesser offense." *Id.* at 1104. The court noted that this requirement was relevant under the previous criminal code and was omitted by the current statutory definition of "included offenses." *Id.* at 1105 n.11. IND. CODE § 35-41-1-2 (Supp. 1980).

[108]The court also articulated an alternate test for whether an offense is "necessarily included." 394 N.E.2d at 1104. The author found this articulation to be of little assistance in understanding the court's actions.

[109]*Id.* at 1110.

over whether the defendant committed the distinguishing elements, then the jury should not be given the opportunity to convict the defendant of the lesser offense.[110] The court reasoned that if there was no dispute over the elements which distinguished the lesser from the greater offense, "the defendant is either guilty of the offense charged or not guilty of any offense."[111] Additionally, if the distinguishing elements are not in dispute, a guilty verdict on the "lesser offense would simply be inconsistent with the evidence—and hence, . . . improper."[112] The court's requirement that there be a serious dispute over the distinguishing elements is not a new analysis. Indeed, the court relied directly on decisions of the Indiana Supreme Court.[113]

Applying this test to *Roddy*, the court concluded that under the charging instrument, both assault[114] and assault with intent to commit a felony[115] were "necessarily included" in the greater offense of commission, or attempted commission, of a felony while armed with a deadly weapon.[116] The court further ruled that because Roddy did not contest the evidence which supported the distinguishing elements between the lesser and greater offenses, the jury should not have been instructed on the lesser offenses.[117]

A defendant in a criminal case may properly agree to plead guilty to an offense otherwise barred by double jeopardy.[118] In *Lutes v.*

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[110]*Id.* at 1111.

[111]*Id.* at 1112. The court reasoned that this test "lessens the possibility of compromise verdicts between those jurors who believe the defendant guilty . . . and those who believe him not guilty." *Id.*

[112]*Id.*

[113]Lawrence v. State, 268 Ind. 330, 375 N.E.2d 208 (1978); Hash v. State, 258 Ind. 692, 284 N.E.2d 770 (1972).

[114]*See* IND. CODE § 35-13-4-7 (1976) (repealed 1977). The court concluded that assault was an "inherently included" lesser offense. 394 N.E.2d at 1108.

[115]*See* IND. CODE § 35-1-54-3 (1976) (repealed 1977). The court concluded that assault with intent to commit a felony was a "possibly included" lesser offense and that, under the charging instrument, Roddy allegedly committed all of the essential elements of this offense. 394 N.E.2d at 1109.

[116]394 N.E.2d at 1110. *See* IND. CODE § 35-12-1-1 (1976) (repealed 1977).

[117]394 N.E.2d at 1113. Alternately, the court justified its ruling by finding that the evidence was insufficient as a matter of law to establish a conviction for assault. Thus, Roddy was guilty of the greater offense without having committed the lesser included offense. This bit of legal legerdemain was possible because Roddy was charged with committing robbery through the use of force *or* violence. 394 N.E.2d at 1108. The accusation that violence or fear was used made assault a lesser included offense of armed robbery. However, Roddy had only used fear. Although use of fear alone was sufficient to support a conviction for armed robbery, it was insufficient to support a conviction for assault. *Id.* at 1113 n.29.

[118]A defendant, however, may not validly plead guilty to an offense which does not exist. In Rhode v. State, 391 N.E.2d 666 (Ind. Ct. App. 1979), Rhode was charged with criminal trespass and attempted voluntary manslaughter. He pleaded guilty to attemp-

State,[119] the defendant sought post conviction relief. He had been convicted for commission of a felony while armed,[120] a charge to which he had agreed to plead guilty in return for the state's dismissal of a pending kidnapping charge. Lutes had also been separately convicted of rape arising out of the same criminal incident. His argument, that the prior rape conviction made the later armed felony conviction void on double jeopardy grounds, was rejected by the supreme court.[121] The court noted that the defendant had been represented by counsel and knowingly accepted the proposed plea bargain. Upon this foundation the court concluded that Lutes had waived any double jeopardy claim when he accepted the plea bargain.[122]

D. Searches and Confessions

In *Bradford v. State*,[123] the court ruled that two warrantless searches of the defendant's purse violated her rights under the fourth amendment.[124] The first search, which occurred soon after

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ted reckless homicide but sought to withdraw that plea prior to sentencing, on the theory that his plea was to a nonexistent crime. The trial court denied the motion to withdraw the guilty plea. *Id.* at 667. The court of appeals reversed. *Id.* at 669.

The attempt statute requires a showing of "acting with the culpability required for commission of the crime, [and engaging] in conduct that constitutes a substantial step toward commission of the crime." IND. CODE § 35-41-5-1(a) (Supp. 1980). Reckless homicide is committed by one who "recklessly kills another human being." *Id.* § 35-42-1-5. Prior to the enactment of the penal code, Indiana law had required proof of specific intent to do the act which resulted in the injury. Beeman v. State, 232 Ind. 683, 692, 115 N.E.2d 919, 923 (1953). The state contended that the attempt statute, which required that the state show the culpability required for commission of the crime, altered prior law and allowed conviction of an attempt to commit reckless homicide without showing any specific intent.

The court cited several authorities for the proposition that crimes involving attept always involve proof of the specific intent to commit the crime. The court implied that combining the general attempt statute with any crime requiring recklessness is illogical because it is impossible to have specific intent to do something recklessly. 391 N.E.2d at 668-69 (citing R. PERKINS, CRIMINAL LAW 573-74 (2d ed. 1969); MODEL PENAL CODE § 5.01, Comment (Tent. Draft No. 10, 1960); INDIANA CRIMINAL LAW STUDY COMMISSION: PROPOSED FINAL DRAFT 477 (1974); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 59 (1972)). *Accord*, Zickefoose v. State, 388 N.E.2d 507 (Ind. 1979). The court indicated that the legislature had provided an offense which includes reckless conduct endangering another person. 391 N.E.2d at 669 (citing IND. CODE § 35-42-2-2 (Supp. 1980)).

[119]401 N.E.2d 671 (Ind. 1980).

[120]Rape was the felony involved.

[121]401 N.E.2d at 674.

[122]*Id.*

[123]401 N.E.2d 77 (Ind. Ct. App. 1980).

[124]U.S. CONST. amend. IV. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers,

police secured control over Bradford and her purse,[125] was conducted in the absence of any exigent circumstances. Accordingly, the court, relying on *Arkansas v. Sanders*,[126] ruled that the search was improper.[127] In evaluating the second search, which was an inventory search, the court balanced the relevant state interests[128] with those of the defendant.[129] The court concluded that the state's interests could have been protected by sealing and securely storing the purse; thus, the excessive intrusion was improper.[130]

In *Morris v. State*,[131] the supreme court overturned the defendant's conviction for murder. The court ruled that the defendant was detained in violation of his fourth amendment rights and that his subsequent inculpatory statements were tainted by the detention.[132] The court, treating the detention as a formal arrest,[133] noted that the police did not have an arrest warrant for the defendant. Evaluating the circumstances surrounding Morris' detention, the court concluded that the arrest was an investigatory device; that the

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and effects, against unreasonable searches and seizures, shall not be violated, and 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.

[125]Bradford was detained after the smell of marijuana was detected escaping from a car occupied by her. At that time a search of Bradford's purse was conducted and marijuana was discovered. Bradford was then taken to jail where a second search of her purse revealed phencyclidine (PCP). Bradford challenged her convictions for possession of marijuana and PCP.

[126]442 U.S. 753 (1979). In *Sanders* the Court held that if an automobile is properly stopped and there are no exigent circumstances, the police must obtain a search warrant before searching luggage found in the car. *Id.* at 763-66.

[127]401 N.E.2d at 80.

[128]The state's interests were listed as: "(i) protection of the police from danger; (ii) protection of the police against claims and disputes over lost or stolen property; and (iii) protection of the owner's property while it remains in police custody." *Id.* (quoting Dearing v. State, 393 N.E.2d 167, 172 (Ind. 1979)).

[129]Bradford was deemed to have a valid privacy interest in the purse's contents. 401 N.E.2d at 80.

[130]*Id.*

[131]399 N.E.2d 740 (Ind. 1980).

[132]*Id.* at 744. The defendant voluntarily accompanied police to the station on the morning of the murder. At that time, he made no inculpatory statements. The following morning. Morris returned to the police station. There was no indication that the second trip was voluntary. The court ruled that any fourth amendment violation which occurred on the first trip had no effect on Morris' trial. However, the court reviewed the propriety of the later visit to the police station during which Morris made inculpatory statements.

[133]*Id.* at 741. The basis for this treatment is Dunaway v. New York, 442 U.S. 200 (1979). In *Dunaway*, the Supreme Court ruled that although the defendant was not formally arrested, his detention was the functional equivalent of a formal arrest and should be treated as an arrest for fourth amendment purposes. *Id.* at 215-16.

police lacked probable cause; and that the arrest was unlawful because it was supported by neither a warrant nor by probable cause.[134] Furthermore, the court evaluated the effect of the unlawful arrest upon Morris' inculpatory statements and concluded that the statements were indeed tainted by the arrest.[135] Accordingly, the court ruled that the inculpatory statements and subsequently discovered physical evidence should have been suppressed.[136]

The dissent, citing various pieces of testimony in the record, argued that the police had probable cause to arrest Morris.[137] The dissent also claimed that there was sufficient untainted evidence to support Morris' conviction.[138] Although it is difficult to evaluate the merits of the dissent's first argument, the validity of the second argument will be tested at the defendant's retrial.

In *Mulry v. State*,[139] a prosecutor's failure to adequately prove that arrestees were advised fully of their constitutional rights resulted in the suppression of subsequent inculpatory statements. Following their arrest,[140] the defendants made inculpatory statements in response to police questions. In reviewing the admissibility of the statements, the court evaluated whether the defendants had been properly informed of their *Miranda* rights[141] and, if so, whether the

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[134]399 N.E.2d at 743. These conclusions were supported by trial testimony. A deputy police chief stated that at the time of the defendant's detention, Morris was only a suspect and had not been arrested because the case was still under investigation. *Id.* at 742.

[135]*Id.* at 744. The court's analysis tracked that of the Supreme Court in Brown v. Illinois, 422 U.S. 590 (1975). In *Brown*, the Court held that properly advising a defendant of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), did not automatically render admissible statements made by one is unlawfully detained. Instead, the Court evaluated whether the inculpatory conduct " 'was sufficiently an act of free will to purge the primary taint of the unlawful [conduct].' " 399 N.E.2d at 742 (quoting Brown v. Illinois, 422 U.S. at 602 (quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963))). Relevant factors include " '[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.' " 399 N.E.2d at 743 (quoting Brown v. Illinois, 422 U.S. at 603-04).

[136]399 N.E.2d at 744.

[137]*Id* at 744-46. (Givan, C.J., dissenting).

[138]*Id.* at 745.

[139]399 N.E.2d 413 (Ind. Ct. App. 1980).

[140]The defendants, Mulry and Trusley, were arrested and subsequently convicted of malicious trespass, *id.* at 415, in violation of IND. CODE § 35-1-66-1 (1976) (repealed 1977).

[141]Miranda v. Arizona, 384 U.S. 436 (1966). The Supreme Court held:

> When an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the ex-

inculpatory statements constituted a knowing and intelligent waiver of those rights.

The court's inquiry focused on the testimony of the arresting officer. The officer testified that he had advised the defendants of their "*Miranda* rights" by reading the rights from a card obtained from the Marion County Sheriff's Department. The officer then recited those rights for the record. The recitation, however, omitted any warnings that statements made by the arrestees could later be used against them. Based on this omission, the court ruled that the requisite *Miranda* warnings were not given, that the defendants could not have knowingly waived rights of which they were unaware, and that subsequent statements made by the defendants were improperly admitted into evidence.[142]

Furthermore, the court held that a confession obtained in violation of *Miranda* could not be admitted into evidence, even if the confessions were obtained in accordance with the requirements of the Indiana voluntariness statute.[143] The Indiana statute provides that judges shall consider various factors in evaluating the voluntariness of confessions. Although the factors listed include whether the

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ercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning 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. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Id. at 478-79.

[142]399 N.E.2d at 417.

[143]*Id.* IND. CODE § 35-5-5-2 (1976) provides:

The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including but not limited to (1) the time elapsing between the arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel, and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. The presence or absence of any of the above mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

Miranda warnings are given, the statute also states that the absence or presence of any particular factor "need not be conclusive on the issue of voluntariness."[144] The court, however, ruled that regardless of the statute, failure to meet the requirements of *Miranda* automatically resulted in the exclusion of subsequently obtained confessions.[145] The court considered this result to be constitutionally mandated under the Supreme Court's decision in *Miranda*.[146]

The dissent interpreted the evidence as adequately demonstrating that the defendants were given their full *Miranda* warnings.[147] This interpretation was based on the arresting officer's testimony that the defendants were read their rights directly from a standard printed card. Thus, the dissent argued that the officer's failure to read one of the printed rights did not necessarily mean that the defendants were not properly advised of their rights.[148]

Mulry can be contrasted with *Grey v. State*.[149] In *Grey* the court upheld the defendant's conviction despite the fact that one set of oral *Miranda* warnings given did not warn the defendant that anything he said could be used against him. The court's ruling was based on the additional fact that the defendant was also given several sets of complete *Miranda* warnings before the defendant made any inculpatory statements.[150]

The supreme court, in *Brandon v. State*,[151] adopted the rule previously enunciated in *Clark v. State*,[152] that it is improper for the state to introduce into evidence a probable cause affidavit or search warrant when the state seeks to introduce the items seized.[153] This holding represents a repudiation of the former rule of *Mata v.*

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[144]399 N.E.2d at 417.

[145]*Id.* The court also noted that the Indiana statute is modeled after a federal statute, 18 U.S.C. § 3501(b) (1976). The court stated that although the federal statute was enacted to offset the effects of *Miranda*, the statute has not been interpreted as reducing the burden imposed on police by *Miranda*. 399 N.E.2d at 417-18 n.3.

[146]Furthermore, the court ruled that suppression of the evidence required a new trial for Mulry, but not for Trusley. 399 N.E.2d at 419. This result was based on differences in the remaining evidence presented against the two defendants: an injury suffered by Trusley during the commission of the crime left a telltale blood stain.

[147]*Id.* at 420-23 (Buchanan, C.J., dissenting).

[148]*Id.* at 421. Indeed, adoption of the majority's viewpoint could lead to the conclusion that the "*Miranda*" cards distributed by the Marion County Sheriff's Department incompletely inform defendants of their rights.

[149]404 N.E.2d 1348 (Ind. 1980). These warnings were both oral and written.

[150]*Id.* at 1352.

[151]396 N.E.2d 365 (Ind. 1979).

[152]379 N.E.2d 987 (Ind. Ct. App. 1978).

[153]396 N.E.2d at 369. The trial court determines questions of admissibility of evidence obtained by means of a search warrant. No function is served by requiring the search warrant or probable cause affidavit to be viewed by the jury.

State.[154] The current rule serves to protect defendants from the prejudicial material often contained in the probable cause affidavit or search warrant.

E. Speedy Trial

In *Terry v. State*,[155] the court rejected a claim that a two and a half year delay between the filing of charges and subsequent arrest of the defendant violated his right to a speedy trial.[156] The defendant was formally charged with robbery in March 1975, and an arrest warrant was promptly issued. The defendant was not arrested, however, until November 1977, and spent the interim unaware that charges had been filed against him.

The majority, in analyzing the defendant's claim, relied on factors set out by the United States Supreme Court in *Barker v. Wingo*,[157] and ruled that the length of the delay was "of sufficient presumptive prejudice to trigger a *Barker* inquiry into the other factors."[158] Focusing particularly on whether the delay had injured Terry, the court held that the burden of demonstrating prejudice was on the defendant and that Terry had failed to show that he was actually prejudiced by the delay.[159]

The dissent, noting that none of the cases relied on by the majority involved situations analogous to Terry's, emphasized that the delay was due solely to the state's negligence in arresting Terry.[160] Moreover, the dissent emphasized that because of the nature of the delay, the defendant was unable to particularize the prejudice caused by the delay or to evaluate the evidence lost to him by the delay.[161] Indeed, the dissent's points are convincing. While the state was able to accumulate evidence almost immediately after the issuance of the arrest warrant, Terry spent the period unaware of the pending charges. Thus, at trial Terry had "no idea" where he was on the date of the robbery, and was unable to produce any exculpatory evidence.[162] Although a generalized claim of prejudice might be insuffi-

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[154]203 Ind. 291, 179 N.E. 916 (1932). In *Mata*, the court required the introduction into evidence of the search warrant under which items were seized if the state sought to introduce the items seized pursuant to the search.

[155]400 N.E.2d 1158 (Ind. Ct. App. 1980).

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

[157]407 U.S. 514 (1972). In *Barker*, the Court listed four relevant factors in evaluating whether a defendant has been deprived of his right to a speedy trial: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530.

[158]400 N.E.2d at 1160.

[159]*Id.* at 1161.

[160]*Id.* at 1164 (Staton, J., dissenting).

[161]*Id.*

[162]*Id.*

cient in challenging a lesser delay, the claim is extremely strong in *Terry* because of the great delay. Unfortunately, this issue was not thoroughly addressed by the majority.

In *Robinson v. State*,[163] the court ruled that under Criminal Rule 4(B)(1)[164] the defendant was "brought to trial" when the jury was impaneled. The court based its decision on *Crim v. State*,[165] a double jeopardy case, in which the court stated that a criminal trial before a jury commenced when the jury was selected and sworn. Accordingly, it was irrelevant that no evidence was presented until more than seventy days after the defendant's request for an early trial because the case was no longer controlled by Criminal Rule 4(B)(1).[166]

In *Back v. Starke Circuit Court*,[167] the court ruled that, for purposes of Criminal Rule 4(C),[168] when previously dismissed charges are refiled, the refiling is considered to have taken place on the day that the initial charges were filed.[169] The court also ruled that the relators were not obligated to undertake affirmative action to bring themselves to trial within the one year period set out in Criminal Rule 4(C), and, accordingly, they did not waive their rights under the Rule by their failure to object to their late trial date.[170]

In *Back*, the relators[171] were charged and arrested in September

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[163]389 N.E.2d 371 (Ind. Ct. App. 1979).

[164]IND. R. CR. P. 4(B)(1) provides in part:

If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar. Provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as set forth in subdivision (A) of this rule.

[165]156 Ind. App. 66, 294 N.E.2d 822 (1973).

[166]389 N.E.2d at 374.

[167]390 N.E.2d 643 (Ind. 1979).

[168]IND. R. CR. P. 4(C) provides in part:

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; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as under subdivision (A) of this rule. Any defendant so held shall, on motion, be discharged.

[169]390 N.E.2d at 644.

[170]*Id.* at 645.

[171]The relators were Marcel and Randy Back.

1976,[172] and obtained dismissal of the charges on October 28, 1977. On November 28, 1977 the state refiled the charges against the Backs, and in August 1978 a trial date was set.[173] The Backs obtained a continuance and on November 8, 1978 filed a motion for discharge for unnecessary delay pursuant to Criminal Rule 4(C). The court, quoting from *State ex rel. Hasch v. Johnson Circuit Court*,[174] noted that if "the identical charge is refiled, it must be regarded as if there had been no dismissal of the first affidavit, or as if the second affidavit had been filed on the date of the first."[175] The court, taking into consideration delays chargeable to the Backs, ruled that the one year period set forth in Criminal Rule 4(C) expired on November 28, 1977 as to Randy and on November 30, 1977 as to Marcel.[176]

In the portion of the opinion dealing with waiver, the court distinguished cases[177] in which the defendants remained silent and allowed the courts to set trials or pretrial conferences on dates beyond those required by Criminal Rule 4(B). The court stated that:

> We have never held that a defendant must take affirmative action to bring himself to trial, except under Ind. R. Crim. P. 4(B), if an early trial is desired. We have only held that he may not benefit from an error by the court when he was aware of the same, or by the exercise of due diligence should have been aware of it, at a time when it could have been averted and failed to object, thereby contributing to it.[178]

The court concluded that "[a] defendant is not required to take affirmative action to obtain a trial within the one year period set by C.R. 4(C)."[179]

There are two questionable aspects of the court's decision on the refiling issue. The first is the court's application of *Hasch*. *Hasch* in-

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[172]390 N.E.2d at 643. The Backs were charged on Sept. 21, 1976. Randy was arrested on Sept. 23, 1976, and Marcel was arrested on Sept. 25, 1976. The one year period under Criminal Rule 4(C) runs from the date the charge is filed *or* the date of a defendant's arrest, whichever is later. Therefore, the court's calculations for the Backs were based on the dates of their arrests.

[173]Trial was docketed for Nov. 2, 1978.

[174]234 Ind. 429, 127 N.E.2d 600 (1955).

[175]390 N.E.2d at 644 (quoting Hasch v. Johnson Circuit Court, 234 Ind. at 435, 127 N.E.2d at 602-03).

[176]*See* note 146 *supra*.

[177]390 N.E.2d at 644-45, wherein the court distinguished Utterback v. State, 261 Ind. 685, 310 N.E.2d 552 (1974) and State *ex rel.* Wernke v. Hendricks Superior Court, 264 Ind. 646, 348 N.E.2d 644 (1976).

[178]390 N.E.2d at 645.

[179]*Id.*

volved a state-instituted dismissal of charges, and the language relied on from *Hasch* was based on the possibility that the state would seek to circumvent speedy trial requirements by refiling charges that it had voluntarily dismissed. Thus, although reliance on *Hasch* may have been justified, a careful analysis of the differences between *Back* and *Hasch* and the relevance of *Hasch* to *Back* would have been appropriate. Instead, the court seems to have replaced analysis with quotations of facially appropriate language from *Hasch*.

Additionally, in calculating the Criminal Rule 4(C) one year period following the relators' arrests, the court did not exclude the period between the initial dismissal and the refiling of the charges. Although this period did not affect the outcome of this case, the court's failure to exclude this period could well affect a subsequent case. Moreover, the failure to exclude this period is not justified by *Hasch*, in which the court explicitly stated that "[t]he only exception [to the rule that refiling is considered to have occurred on the date of the initial filing] might be as to the intervening period between the dismissal and refiling of the charge—a question which we are not called upon to decide."[180] Thus, the court in *Back* should not have so blithely included the period between the dismissal and the refiling.

In *Pillars v. State*,[181] the court dealt with delays in the trial which are chargeable to the defendant under Criminal Rule 4(C).[182] The court held that a two week period during which the defendant's motion to withdraw was pending[183] "in no way affected the date upon which [the defendant's] trial could have been set."[184] The court also ruled that the defendant's initial failure to comply with a discovery order "should not have affected the setting of a trial date."[185] This conclusion was based on the observation that "[d]iscovery often continues until the time of trial; clearly, it need not be completed before the court sets a trial date."[186]

The court also held that Pillars did not waive his Criminal Rule 4(C) rights. The state's claim of waiver was based on the appellate court's calculation that a trial date should have been set by May 24, 1977; that on May 16, 1977 the trial court rescheduled the defendant's

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[180]234 Ind. at 435, 127 N.E.2d at 603.

[181]390 N.E.2d 679 (Ind. Ct. App. 1979).

[182]*See* note 168 *supra*.

[183]Counsel filed the motion to withdraw on Mar. 16, 1977. The motion was based on Pillars' failure to cooperate with counsel. A hearing on the motion was held on Apr. 1, 1977 and, following the hearing, the motion was denied. 390 N.E.2d at 680-81.

[184]*Id.* at 682.

[185]*Id.*

[186]*Id.*

trial for June 7, 1977; and that the defendant did not object to the rescheduling until May 26, 1977. Ruling that no waiver occurred, the court relied on Pillars' attorney's statement that, although the rescheduling occurred on May 16, he was unable to obtain a docket sheet until May 26 and therefore, was unable to ascertain that the trial date was in violation of Criminal Rule 4(C) until May 26.[187] The court also noted that because the improper rescheduling occurred so close to the May 24 deadline, it was unlikely that an earlier objection would have enabled the trial judge to reschedule the trial within the required period.[188]

The dissent contended that because the acts of counsel are deemed to be those of the defendant, there was a fifteen day delay, during which defense counsel's motion to withdraw was pending, which was chargeable to the defendant.[189] The dissent also argued that Pillars' failure to comply with the trial judge's discovery order caused a delay in the trial.[190] Moreover, the dissent pointed out that Pillars failed to make a timely objection to his trial date, arguing that, although Pillars' attorney did not obtain a docket sheet until May 26, he knew of the rescheduling before the May 24 deadline. Accordingly, an objection could have been made before the passage of the deadline.[191]

F. Conspiracy

The effect of changes in the penal code upon the law of conspiracy is reflected in *Archbold v. State*[192] and *Garcia v. State*.[193] In *Archbold*, the court held that the Indiana conspiracy statute at the time of the defendant's indictment[194] required "a meeting of at least two culpable minds before the offense [was] committed."[195] Under this "bilateral" theory of conspiracy, the defendant's conviction was

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[187]*Id.*

[188]*Id.* The court also discussed the impropriety of later delays in the trial. Although there were indications that later continuances were statutorily justified, the court noted that the record failed to indicate the reasons for the later delays. The court concluded with a reminder of the importance of docket entries to justify delays under Criminal Rule 4. *Id.* at 683.

[189]*Id.* at 686 (Hoffman, J., dissenting).

[190]*Id.*

[191]*Id.* at 686-87.

[192]397 N.E.2d 1071 (Ind. Ct. App. 1979).

[193]394 N.E.2d 106 (Ind. 1979).

[194]397 N.E.2d at 1073. The defendant's appeal was decided under IND. CODE § 35-1-111-1 (1976) (repealed 1977). Under this statute, punishable conduct occurred when "[a]ny person or persons . . . unite or combine with any other person or persons for the purpose of committing a felony."

[195]397 N.E.2d at 1072.

reversed because the sole named co-conspirator was a law enforcement officer feigning participation in the criminal enterprise.[196]

In *Garcia* the court interpreted the current Indiana conspiracy statute as being "unilateral" in nature.[197] Thus, although the only person with whom Garcia conspired was a law enforcement officer, her conviction was upheld.[198] The court relied primarily on the language of the statute in ruling that the legislature had indeed adopted the unilateral approach to conspiracy.[199] The court noted that the relevant statutory language was very similar to that of the Model Penal Code[200] and that the comments to the Model Penal Code

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[196]A dissenting opinion contended that the "unilateral" concept of conspiracy was "better-reasoned" and that nothing in the language of the statute mandated the majority's adoption of the "bilateral" theory. *Id.* at 1074-75 (Buchanan, C.J., dissenting).

[197]394 N.E.2d at 110. *See* IND. CODE § 35-41-5-2 (Supp. 1980). The statute provides that:

> (a) A person conspires to commit a felony when, with intent to commit the felony, he agrees with another person to commit the felony. A conspiracy to commit a felony is a felony of the same class as the underlying felony. However, a conspiracy to commit murder is a Class A felony.
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> (b) The state must allege and prove that either the person or the person with whom he agreed performed an overt act in furtherance of the agreement.
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> (c) It is no defense that the person with whom the accused person is alleged to have conspired:
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> (1) has not been prosecuted;
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> (2) has not been convicted;
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> (3) has been acquitted;
>
> (4) has been convicted of a different crime;
>
> (5) cannot be prosecuted for any reason; or
>
> (6) lacked the capacity to commit the crime.

[198]*See* 394 N.E.2d at 111.

[199]*Id.* at 109-10.

[200]*Id.* at 109-10 & n.3. MODEL PENAL CODE §§ 5.03, .04 (Tent. Draft No. 10, 1960). Section 5.03 states, in pertinent part, that:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
>
> (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
>
> (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

Section 5.04 provides that:

> [I]t is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:
>
> (a) he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if he believes that one of them does; or
>
> (b) the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.

explicitly adopted the unilateral theory.[201] The court further stated that the statute now explicitly provides that "'[i]t is no defense that the person with whom the accused person is alleged to have conspired . . . cannot be prosecuted for any reason.'"[202] The court interpreted this provision as clearly eliminating the defense, available under the bilateral concept, that an alleged co-conspirator lacked criminal culpability.[203]

G. Armed Robbery

In two recent opinions the Indiana Supreme Court discussed the number of robberies committed by a defendant during the course of a single "hold-up." In *Williams v. State*,[204] the defendant was convicted of four counts of armed robbery. Although the convictions were based on a single bank robbery, there were four separate convictions because the defendant approached four tellers and ordered each of them to put money into a pillowcase. On appeal, the Indiana Supreme Court held that "an individual who robs a business establishment, taking that business's money from four employees, can be convicted of only one count of armed robbery."[205]

The court's opinion was based primarily on the federal bank robbery statute[206] and several cases interpreting that statute.[207] The court noted that the relevant case law held that the statute prohibited *bank* robbery, that each occurrence constituted only one

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[201]394 N.E.2d at 108. *See* MODEL PENAL CODE § 503, at 105, Comment (Tent. Draft No. 10, 1966).

[202]394 N.E.2d at 109 (quoting IND. CODE § 35-41-5-2(c)(5) (Supp. 1980)).

[203]In ruling that the legislature had enacted a unilateral conspiracy statute, the court rejected Garcia's claim that the drafters did *not* intend to change the law. 394 N.E.2d at 109. Garcia's claim was based on the comment, made by the drafters, that "[a]s to what constitutes conspiracy or what amounts to conspiratorial agreement, the present law . . . is not sought to be changed." *Id.* at 110 n.4. INDIANA CRIMINAL LAW STUDY COMMISSION: PROPOSED FINAL DRAFT 70 (1974). The court interpreted this comment as referring to the "law relative to the offense, except for the elimination of the enumerated defenses." 394 N.E.2d at 110.

[204]395 N.E.2d 239 (Ind. 1979).

[205]*Id.* at 248-49. IND. CODE § 35-42-5-1 (1976 & Supp. 1980) provides:

> A person who knowingly or intentionally takes property from another person or from the presence of another person:
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> (1) by using or threatening the use of force on any person; or
>
> (2) by putting any person in fear;
>
> commits robbery, a Class C felony. However, the offense is a Class B felony if it is committed while armed with a deadly weapon, and a Class A felony if it results in either bodily injury or serious bodily injury to any other person.

[206]18 U.S.C. § 2113 (1976).

[207]*E.g.*, United States v. Alexander, 471 F.2d 923 (D.C. Cir. 1972); United States v. Canty, 469 F.2d 114 (D.C. Cir. 1972).

bank robbery,[208] and that each robbery "constituted a unitary transaction"[209] or one offense. The court adopted this reasoning, that "the law involved [in the federal bank robbery cases] would be logically identical to that which is applicable when more than one employee hands over a single business's money or property to a robber."[210] Accordingly, the court ruled that Williams had committed only one robbery.[211]

The application of the *Williams* rationale was limited soon after its adoption. In *McKinley v. State*,[212] the defendant entered a drugstore which was operated as a sole proprietorship. After drawing a gun, McKinley ordered the store's cashier to give him the money from the cash register. He then robbed the store's proprietor of his personal wristwatch and of his wallet. Based on this incident the defendant was convicted of two counts of armed robbery. In a tersely worded opinion the Indiana Supreme Court rejected the defendant's claim that, under *Williams*, he had committed only one armed robbery.[213]

The court stated that if the defendant had taken the pharmacy's money from the employee and from the proprietor, *Williams* would indeed apply.[214] However, although the holding in *Williams* "was couched in terms of 'business establishment' and the 'business's money,'"[215] the holding did not require "that the business entity be a separate 'person' as is a corporation or partnership."[216] The court further reasoned that although the robbery of the business enterprise constituted one count of armed robbery, "[w]hen [the] petitioner relieved the store owner of his personal wristwatch and wallet, his actions took on a different character."[217] The court noted that although the defendant's actions harmed only one individual and, thus, only one legal entity, those actions wronged both the individual and his business.[218] This metaphysical distinction resulted in the defendant receiving *consecutive* sentences of ten and twenty

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[208]395 N.E.2d at 247 (quoting United States v. Canty, 469 F.2d 114, 126 (D.C. Cir. 1972).

[209]395 N.E.2d at 247 (quoting United States v. Hopkins, 464 F.2d 816, 823 (D.C. Cir. 1972).

[210]395 N.E.2d at 248.

[211]*Id.* at 248-49.

[212]400 N.E.2d at 1378 (Ind. 1980).

[213]*Id.* at 1379.

[214]*Id.*

[215]*Id.*

[216]*Id.*

[217]*Id.*

[218]*Id.*

years.[219] The court's opinion concluded that the "'basic reality'" of the robbery did not "'constitute a unitary transaction.'"[220]

The court's reasoning in *McKinley* is unconvincing. Although the *Williams* decision was couched in terms of taking the business's money, the focal point seemed to be that because the funds of only one entity were taken, only one armed robbery was committed. Applying this reasoning, McKinley robbed only one entity, the proprietor of the drugstore. The court, however, did not accept this analysis in deciding *McKinley*.

H. Sexually Explicit Materials

In *Ford v. State*,[221] the defendant was convicted of distributing obscene matter.[222] He contended that the Indiana obscenity statute[223] violated constitutional guarantees protecting free speech,[224] due process,[225] privacy,[226] and equal protection.[227] The court expended little effort in rejecting these claims, relying heavily on decisions of the United States Supreme Court which had previously dealt with many of the issues raised by Ford.

Ford's first amendment claim consisted of challenges to the state's ability to regulate sexually explicit materials, and to the breadth of the state's definition of "obscene matter."[228] Neither of

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[219]*Id.* at 1378. The opinion did not specify which sentence was based on the robbery of the proprietorship or which sentence was based on the robbery of the proprietor.

[220]*Id.* at 1379 (quoting United States v. Hopkins, 464 F.2d at 823.

[221]394 N.E.2d 250 (Ind. Ct. App. 1979).

[222]*Id.* at 251.

[223]IND. CODE §§ 35-30-10.1-1 to -8 (Supp. 1980). The defendant was arrested in 1975. Some language in the statute has since been amended. Any relevant difference between the current statute and the version evaluated by the court will be noted.

[224]U.S. CONST. amend. I.

[225]U.S. CONST. amend. V.

[226]In Stanley v. Georgia, 394 U.S. 557 (1969), the Court recognized that individuals have a constitutionally protected privacy interest in the personal possession of obscene materials. *See also* United States v. Reidel, 402 U.S. 351, 354-56 (1971).

[227]U.S. CONST. amend. XIV.

[228]IND. CODE § 35-30-10.1-1 (1976) states, *inter alia*, that

> (c) Any matter or performance is obscene if: (i) the average person, applying contemporary community standards, finds that the dominant theme of the matter or performance taken as a whole, appeals to the prurient interest in sex, and (ii) the matter or performance depicts or describes in a patently offensive way, sexual conduct, and (iii) the matter or performance, taken as a whole, lacks serious literary, artistic, political or scientific value.
>
> (d) "Sexual conduct" means (i) acts of actual sexual intercourse, or sodomy; or (ii) exhibition of the uncovered genitals in the context of masturbation or other actual sexual activity; or (iii) depiction of sado-masochistic abuse.

these claims was successful.[229] The Supreme Court has clearly established that "obscene" materials are outside the protection of the first amendment.[230] Additionally, the statute's definition of "obscenity" closely parallels the definition accepted by the Supreme Court as constitutionally adequate.[231]

Ford's second constitutional argument claimed that the Indiana obscenity statute was vague and thus violated his due process rights. He contended that the statute failed to give adequate warning of the conduct proscribed.[232] The court's response was a lengthy quote from *Roth v. United States*[233] in which the Supreme Court rejected a due process vagueness attack against a different obscenity statute.[234]

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[229]The court dealt with the latter claim by ruling that the statute was neither vague nor overbroad. Accordingly, the prohibition did not violate any of Ford's first amendment rights. This analysis appears to confuse the overbreadth doctrine of first amendment with the due process prohibition against vague statutes. The overbreadth doctrine requires that when the government enacts regulations which serve legitimate interests "it must do so by narrowly drawn regulations designed to serve those [legitimate] interests without unnecessarily interfering with First Amendment freedoms." Village of Schaumburg v. Citizens for a Better Environment, 100 S. Ct. 826, 836 (1980). By contrast, the prohibition against vague statutes is based on due process considerations because "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." Conally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[230]Miller v. California, 413 U.S. 15 (1973); Roth v. United States, 354 U.S. 476 (1957).

[231]In Miller v. California, 413 U.S. 15 (1973), the Court stated:

> A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.
>
> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24-25 (citations omitted). Compare this language with the definition of obscene material found in IND. CODE § 35-30-10.1-1 (1976).

[232]Thus, the court found itself discussing the vagueness issue twice; first, in response to Ford's first amendment claims and second, in response to his due process claim. The vagueness analysis, however, was properly applicable only to Ford's due process claims. *See* note 229 *supra*.

[233]354 U.S. 476 (1957).

[234]The point of the excerpt from *Roth* was that statutes proscribing sexually explicit materials give constitutionally adequate warning of the conduct forbidden when such statutes are applied to a proper standard for judging obscenity. The Indiana court concluded that the legal definition of obscenity did not change with each indict-

Ford's next constitutional argument was that punishing the distribution of obscene materials to consenting adults was an invasion of the right to privacy, particularly since the Court in *Stanley v. Georgia*[235] held that the private ownership of obscene materials was constitutionally protected by the right to privacy.[236] The court rejected this claim[237] by relying on a Supreme Court decision rejecting a similar effort to expand the holding of *Stanley* beyond cases involving the private possession of obscene materials.[238]

Ford's final constitutional argument was that there was no rational basis for the various exemptions contained in the obscenity statute.[239] The court held that the statute involved neither a suspect class nor a fundamental right;[240] that a reasonableness test governed Ford's claims; and that he had failed to demonstrate that no rational basis existed for the different treatment extended to the exempted classes.

Ford also raised one non-constitutional argument. He claimed that the jury's verdict was not supported by substantial evidence because the prosecutor's proof that the magazine in question was indeed obscene consisted solely of the magazine. The court, relying on *Paris Adult Theatre I v. Slaton*,[241] ruled that the evidence was sufficient.[242] The court noted that "'hard core pornography . . . can and does speak for itself.'"[243]

As a result of the court's ruling on the sufficiency of the evidence, the state was required neither to present evidence of the relevant community standard nor to show how, under that standard, the material appealed to the prurient interest in sex. Yet, both the community standard and the appeal to the prurient interest in sex

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ment and that the definition gave adequate notice of the conduct proscribed. 394 N.E.2d at 254.

[235]394 U.S. 557 (1969).

[236]*Id.* at 568.

[237]394 N.E.2d at 255.

[238]The case relied on was United States v. Orito, 413 U.S. 139 (1973). In *Orito*, the Court upheld a conviction for transporting obscene materials in interstate commerce, ruling that *Stanley* did not extend beyond the privacy of the home. *See also* United States v. 12200-Ft. Reels of Film, 413 U.S. 123 (1973) (refusing to extend *Stanley* to the showing of obscene films to consenting adults in a commercial theatre); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) (refusing to extend *Stanley* to the importing of obscene materials, even if for the private use of the importer).

[239]IND. CODE § 35-30-10.1-4(b) (1976) (repealed 1977). Institutions exempt from prosecution included, *inter alia*, schools, churches, and government agencies. No comparable exemption is currently found in the penal code.

[240]394 N.E.2d at 255. The court reasoned that because obscene material is unprotected by the first amendment, there was no fundamental free speech right involved.

[241]413 U.S. 49 (1973).

[242]394 N.E.2d at 252.

[243]*Id.* (quoting United States v. Wild, 422 F.2d 34, 36 (2d Cir. 1969)).

are portions of the statutory definition of obscene matter.[244] Thus, the state did not need to demonstrate specifically that the material in question met the statutory definition. Instead, the prosecutor presented the materials to the jurors and allowed them to evaluate, based upon their individual perceptions of the relevant community standard, whether the matter appealed to the prurient interest in sex. This procedure drew sharp criticism from the dissent.

The dissent contended[245] that neither the conduct proscribed nor the basis for proscription were adequately set forth in the statute. The dissent further noted that "the practical consequence of the statute is to create a community of the twelve [jurors whose] standards . . . largely determine *ex post facto* whether material is obscene."[246] In light of the majority's adherence to Supreme Court precedent, this complaint is directed both at the United States Supreme Court and at the *Ford* decision. Indeed, the Supreme Court has set up a legal framework in which criminally proscribed conduct is delineated by reference to a nebulously defined "relevant community standard." This standard is eventually given concrete form by a jury's verdict, too late to assist the defendant.[247] The Indiana appellate court, in its adoption of lengthy quotes from Supreme Court opinions, has done little to remedy this situation. Thus, as long as the current judicial approach to "spicy" materials continues, purveyors of such materials must continue to risk the jurors' reactions to the dealers' wares.

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[244]*See* IND. CODE § 35-30-10.1-1 (1976).

[245]394 N.E.2d at 256-58 (Garrard, J., dissenting).

[246]*Id.* at 258.

[247]*See, e.g.*, Jenkins v. Georgia, 418 U.S. 153 (1974) (reversing a finding that Academy Award nominee *Carnal Knowledge* was obscene). The appeals process, although available, is a limited and arduous means of vindicating one's rights. For further elaboration of the problems inherent in the Supreme Court's current framework for dealing with sexually explicit materials, *see* Smith v. United States, 431 U.S. 291, 311 (1977) (Stevens, J., dissenting); Note, *First Amendment—Obscenity*, 68 J. CRIM. L. & CRIMINOLOGY 613 (1977).