Survey of Recent Developments in Indiana Criminal Law and Procedure

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> "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education."[1]

The Indiana courts, buttressed by the fervor generated by the recent "war on drugs" and the general hostility toward criminal defendants, continued to curtail defendants' rights in cases decided this survey period. Criminal defense attorneys are facing new challenges to traditional tenets of criminal law,[2] and in order to be successful are required to develop new and creative arguments. This Article is designed to aid the practicing attorney by analyzing recent developments in criminal law.

I. Confrontation Issues

A. Child Sexual Abuse Cases: The Admissibility of Out of Court Statements

A continuing issue during this survey period is the admissibility of out-of-court statements of "child victims" which form the basis for

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1. Thomas Jefferson.

2. *See, e.g.*, Bergfeld v. State, 531 N.E.2d 486 (Ind. 1988). The Indiana Supreme Court held that a warrantless search of motel premises was justified because the police officers had probable cause to believe a crime had been or was being committed in the motel room and, therefore, exigent circumstances legitimized the warrantless search, despite the fact that one defendant was already in custody. Justice Shepard, dissenting, called this decision a "rogue far enough outside the mainstream of fourth amendment jurisprudence that it will not serve as precedent." *Id.* at 495. *See supra* section II for a detailed discussion on search and seizure.

child sexual abuse prosecutions. Often these statements comprise the state's primary evidence. Compounding the difficulty inherent in trying cases in this area is that often the alleged victim is under the age of ten and is therefore presumed to be incompetent,[3] and the state is unable to rebut that presumption.

A statute enacted in 1984[4] provides that if certain requirements are met, "statements or videotapes" made by a child/victim are admissible in the trial.[5] The statute, known as the child hearsay statute,[6] has been at the center of many important cases decided during this survey period; this section will concentrate primarily on those decisions and the resulting impact upon confrontation analysis.

The child hearsay statute provides for the admission of a "statement or videotape" contingent upon the following conditions: The child must be under the age of ten; the statement must contain allegations of an act which is a material element of the purported crime committed against the child; the statements of the child must be otherwise inadmissible; and, if the child is unavailable, as determined at a pretrial hearing attended by the child and defendant, at which the accused is afforded the full right to cross-examine and confront the witness, there must be corroborative evidence of the act.[7] Additionally, before the pretrial statement can be used, the trial court must determine "that the time, content,

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3. IND. CODE § 34-1-14-5 (1988) governs the competence of witnesses in criminal cases through its incorporation of IND. CODE § 35-37-4-1 (1988). It provides in part: "The following persons shall not be competent witnesses: . . . Children under ten [10] years of age, unless it appears that they understand the nature and obligation of an oath." IND. CODE § 34-1-14-5 (1988).

4. IND. CODE § 35-37-4-6 (1988). The statute was enacted in 1984 by Public Law 180-1984.

5. *Id.*

6. *Id.*

7. The relevant parts of IND. CODE § 35-37-4-6 read as follows:

Sec. 6. (a) This section applies to criminal actions for the following:

(1) Child molesting (IC 35-42-4-3).

* * *

(b) A statement or videotape that:

(1) is made by a child who was under ten (10) years of age at the time of the statement or videotape;

(2) concerns an act that is a material element of an offense listed in subsection (a) that was allegedly committed against the child; and

(3) is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in a criminal action for an offense listed in subsection (a) if the requirements of subsection (c) are met.

(c) A statement or videotape described in subsection (b) is admissible in evidence in a criminal action listed in subsection (a) if, after notice to the defendant of a hearing and of his right to be present:

and circumstances of the statement or videotape provide sufficient indications of reliability."[8]

The Indiana Supreme Court determined in *Miller v. State*[9] ("*Miller I*") that the fact that a child is incompetent to testify at trial does not vitiate the statutory mandate that the child testify and be subject to cross examination at some point during the progress of the case through the judicial system.[10] The court held that the confrontation clauses of the United States Constitution[11] and the Indiana Constitution[12] separately require that the defendant be accorded some opportunity, either at trial or in a pretrial hearing, to confront his accuser.[13] However, *Miller I* left the requirements of the child hearsay statute somewhat unclear.

The parameters of the child hearsay statute were clarified by the court in *Miller v. State*[14] ("*Miller II*"). There, the court held that the state's failure to produce the child at the hearing to determine the admissibility of the statements or videotapes and the failure to produce the child at the trial constitutes a denial of the defendant's right to confrontation.[15] The court determined that even if the child is found to

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(1) the court finds, in a hearing:
(A) conducted outside the presence of the jury; and
(B) attended by the child; that the time, content, and circumstance of the statement or videotape provide sufficient indications of reliability; and
(2) the child:
(A) testifies at the trial; or
(B) is found by the court to be unavailable as a witness because:

* * *

(iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

(d) If a child is unavailable to testify at the trial for a reason listed in subsection (C)(2)(B), a statement or videotape may be admitted in evidence under this section only if there is corroborative evidence of the act that was allegedly committed against the child.

8. IND. CODE § 35-37-4-6 (c) (1988).

9. 517 N.E.2d 64 (Ind. 1987).

10. *Id.* Indeed, any holding to the contrary would violate the defendant's right to confrontation, as guaranteed by the federal and Indiana constitutions. *See supra* notes 11-12.

11. The sixth amendment to the United States Constitution reads "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI.

12. Article I, section 13 of the Indiana Constitution reads "In all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face . . ." IND. CONST. art. I, § 13.

13. 517 N.E.2d at 71, 74.

14. 531 N.E.2d 466, 470 (Ind. 1988).

15. *Id.*

be an incompetent witness, cross-examination must be afforded the defendant.[16]

Furthermore, as emphasized in *Miller II*,[17] there is an independent right to confrontation under the Indiana Constitution. Article I, section 13 of the Indiana Constitution reads "In all criminal prosecutions, the accused shall have the right to . . . meet the witnesses face to face."[18] The emphasis on the state constitutional right to confrontation in both *Miller I* and *Miller II* clarifies the difference between the federal confrontation clause and the state. The explicit language of the two clauses may symbolize a difference in the rights secured. The federal confrontation clause does not contain explicit language mandating a face-to-face confrontation, whereas the Indiana language is explicit.[19]

While the court in both *Miller* cases found that there are state and federal constitutional underpinnings to its decision, the court concentrated on the state right to confrontation. Consequently, in *Miller II,* the court relied only in small part upon the recent case of *Coy v. Iowa*,[20] where the United States Supreme Court affirmed that the words "confronted with the witnesses against him" in the sixth amendment means the defendant must be allowed to meet his accusers literally face-to-face.[21]

Applying an analysis that concentrates on the interpretation of the confrontation clause in the Indiana constitution, the court in *Miller II* held that under the child-hearsay statute,[22] the failure of the state to have present the incompetent child-victim at the hearing to determine the admissibility of the proffered out-of-court statements would deny

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16. *Id.*

17. 531 N.E.2d at 470.

18. IND. CONST. art. I, § 13.

19. The age-old question which has haunted those attempting to determine what rights the federal confrontation clause embodies is whether the sixth amendment was intended to guarantee literal rights to the defendant, or merely to act as a general rule which assures the defendant the opportunity for a fair trial, via cross-examination. If the confrontation clause does guarantee a literal right, is the right absolute or may there be an exception to this right? The United States Supreme Court is split on this topic. *See* Coy v. Iowa, 108 S. Ct. 2798 (1988). *See also* J. WIGMORE, EVIDENCE § 1395 (1975). Wigmore's position is that the confrontation clause primarily serves to guarantee the defendant a fair trial, and cross-examination is the means to do so. *Id.* at § 1396.

20. 108 S. Ct. 2798 (1988).

21. 108 S. Ct. at 2800. In *Coy*, at issue was the propriety of a state statute that provided for a screen to be placed between the defendant and the complaining witness. The witness could not see the defendant while testifying, but the defendant could view the witness. The Court held that the right to "confront" witnesses guaranteed the defendant a face-to-face meeting, and thus the use of the screen as a mechanism to circumvent this right was unconstitutional. *Id.* at 2803.

22. IND. CODE § 35-37-4-6 (1988).

the defendant his right to confront his accusers face-to-face, as guaranteed by the Indiana Constitution.[23]

Interestingly, the Indiana Court of Appeals in *Brady v. State*[24] held that *Coy* and the sixth amendment did not require in all cases the defendant be afforded an opportunity to meet his accusers face-to-face.[25] Citing Justice O'Connor's concurring opinion in *Coy*, that the right to face one's accusers is not absolute, the court in *Brady* held that "the protection of child witnesses in cases such as this is a state interest compelling enough to override a defendant's right to a face-to-face confrontation, provided the procedural safeguard of finding need on case-by-case basis is required and adhered to."[26]

In *Brady*, the videotaped session of the child's statement took place with the child in her own house, with the defendant stationary in the garage watching the interview via television monitor.[27] The only way the defendant could communicate with his attorney was through a two-way radio.[28] The attorneys used flashcards to indicate objections.[29]

These procedures hardly afford the defendant his right to confront the witnesses in a "full adversarial proceeding" at some point in the proceedings. On appeal, the defendant in *Brady* argued that this procedure violated his right to confrontation, and lost.[30]

Narrowly interpreting *Miller I*, the court in *Brady* concluded that because cross examination is the right primarily protected by the confrontation clause, the statute which provides for videotaping a child-

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23. Miller v. State, 531 N.E.2d at 470. The meaning of the right to confrontation in the context of the child-hearsay statute was best analyzed by Chief Justice Shepard in *Miller I*. He wrote:

> The documented history of the Indiana statute, although lean, indicates the legislature intended that the hearing on the admissibility of a child victim's statement be adversarial in nature with full confrontation between Defendant and victim. The legislature intended that the child testify during the hearing, even if the child will be unavailable for trial.

517 N.E.2d at 70. By enacting the child-hearsay statute, the legislature did not intend to circumscribe the defendant's right to confrontation. The legislature provided for the defendant to exercise his right by assuring that either the child would be present and testify at the hearing, allowing the defendant to inquire into the child's statements, or by having the child testify at trial.

24. 540 N.E.2d. 59 (Ind. Ct. App. 1989).

25. *Id.* at 65.

26. *Id.* In *Brady*, the defendant challenged the constitutionality of Indiana Code section 35-37-4-8, which provides for the videotaping of a child's testimony in lieu of live testimony at trial.

27. *Id.*

28. *Id.* at 66.

29. *Id.*

30. *Id.*

witness' testimony in lieu of live testimony is constitutional because it allows the defendant an opportunity to cross-examine, albeit outside the vision of the child if the defendant is represented by an attorney.[31] No literal face-to-face confrontation is required.[32]

It is difficult to justify *Brady* in light of the clear language of the Indiana Supreme Court in *Miller I* and the specific language of the Indiana Constitution. In *Miller I* the court interpreted the child-hearsay statute as preserving the defendant's right to confrontation through cross-examination, fully adversarial in nature, at some point in the proceedings and attended by the defendant.[33] Moreover, the Indiana Constitution specifically imbues criminal defendants with the right to confront their accusers face-to-face.[34] And while the confrontation clause in the sixth amendment only implies this right, in *Coy* the Supreme Court interpreted the clause to require a face-to-face confrontation.[35]

Thus, the long-term significance of *Miller I* and *Miller II* is the emphasis by the court on the state constitutional right to confront accusers face-to-face. Article I, section 13 requires no less. As the United States Supreme Court eviscerates federal rights, the movement toward expanding rights under the state constitution is of critical importance.[36]

B. The Reliability Requirement

The child hearsay statute mandates a separate inquiry into the reliability of the proffered statements.[37] However, until *Miller II*,[38] there were few, if any, decisions indicating what was meant by the terms of the statute, which require the court to determine "that the time, content, and circumstances of the statement or videotape provide sufficient indications of reliability."[39] The statute seems to require a "probe" into the "internal" reliability of the statements.

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31. *Id.*
32. *Id.*
33. Miller v. State, 517 N.E.2d 64 (Ind. 1987).
34. IND. CONST. art. I, § 13.
35. Coy v. Iowa, 108 S. Ct. 2798 (1988).
36. *See also* Lee v. State, 538 N.E.2d 983 (Ind. Ct. App. 1989) and Crull v. State, 540 N.E.2d 1195 (Ind. 1989). In *Lee*, the court determined that for a description of the right to confrontation in a guilty plea, advice that you have the right to meet accusers in court and have them face you is sufficient. 538 N.E.2d at 986. This lends further support to the contention that under the Indiana Constitution, the right to confrontation requires a face-to-face meeting and not just the opportunity to cross examine. In *Crull*, the Indiana Supreme Court determined that on cross-examination a witness must state where he/she currently lives and works, and the state must demonstrate actual threats, and not vague fears before the scope of cross will be limited. 540 N.E.2d at 1199.
37. IND. CODE § 35-37-4-6(c)(1)(B) (1988).
38. Miller v. State, 531 N.E.2d 466 (Ind. 1988).
39. IND. CODE § 35-37-4-6(c) (1988).

The "internal reliability" requirement provided for in the statute is of critical importance. Often police authorities use techniques which are improper and even damaging in their questioning of child witnesses. These techniques are not limited to the police and there have been many documented abuses by social workers, and other "child protection" agencies.[40] The method used by interviewers in assessing the situation often contaminates and reduces the reliability of a child's statements.[41] Only upon close scrutiny of the time, content and circumstances surrounding the statement can a court be sure that the statement contains sufficient indicia of reliability upon which to base its admission.

In *Miller II* the court held that based upon its independent review of the record, the child's statements were not reliable because of the manner of questioning used by the police and social workers.[42] The facts indicate that the child was three years old and "under intense control and scrutiny from 11:00 a.m. until the statement at 6:45 p.m."[43] During that time, not only was she subjected to a physical examination by a strange doctor, but she was also taken to the welfare department and then to the sheriff's office to be confronted by more strangers asking her questions.[44] The court stated: "One cannot imagine a more exhausting, stressful, and coercive situation. The questioning did not commence by drawing the child's attention to her injury and then posing non-suggestive questions to get the child to reveal the source of that injury."[45] Hence, the court concluded that the circumstances surrounding the making of the statement provided insufficient indicia of reliability and thus its admission was not adequately supported.[46]

What occurred in *Miller II* was that a statement made by a child after intense, carefully orchestrated questioning, maybe even rehearsal, designed to elicit the desired results, was used against a defendant in a child abuse case. However, the legitimate need to protect young witnesses from unnecessary trauma cannot be used to abrogate all of the defendant's rights. As the court in *Miller II* recognized, "It seems

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40. Ralph Underwager, M.Div., Ph.D., a noted expert in the field of assessing child abuse cases, noted "[u]nfortunately, the way children are currently being interviewed may not result in obtaining the truth about what really happened. The story that is told often is the one the interviewer wants to hear." The Role of the Psychologist in the Assessment of Cases of Alleged Sexual Abuse of Children, presented at the 94th Annual Convention of the American Psychological Association, Washington D.C., August, 1986, prepared by the Institute for Psychological Therapies.

41. *Id.*,

42. Miller v. State, 531 N.E.2d 466, 470-71 (Ind. 1988).

43. *Id.* at 470.

44. *Id.*

45. *Id.*

46. *Id.* at 471.

unfailingly important that in weighing the value of the child's statement the trier of fact have the opportunity to consider the child's responses when questioned by someone other than a sympathetic interviewer."[47]

II. Arrests, Searches and Seizures

In *Bergfeld v. State*,[48] the Indiana Supreme Court held a warrantless search of a motel room justified because the officers had probable cause to believe a crime had been or was being committed, and exigent circumstances legitimized the ensuing search.[49] In plain words, the majority found exigent circumstances in mere probable cause, contrary to the warrant requirement.

In *Bergfeld*, a "drug dealer, drug user, prostitute, exotic dancer, and one time former police informant" reported to police that she had been abducted by the defendant, her boyfriend, and his friend Orth, taken to a motel room, forced to use cocaine, and repeatedly raped.[50] After she escaped, she called the police and reported the incident.[51] An officer was dispatched to her home, and another dispatched to the motel.[52] The officer at the motel had the clerk call the room to ask whether they planned to check out or stay another day. The defendant told the clerk he was staying another day and would come to the desk to pay. Thereafter, the police, who had surrounded the room, observed the defendant drive away in an automobile.[53]

The police immediately signaled the defendant to stop, but instead he accelerated and shortly thereafter was forced off the road by other officers.[54] Upon exiting the car, police observed a handgun in the defendant's back pocket. The defendant was arrested and taken back to the motel.[55]

At the motel, three police officers knocked on the motel room door with their weapons drawn, without a search warrant.[56] A man later identified as Orth eventually opened the door, after repeated requests by the police to do so, and the officers then made a forced unwarranted

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47. *Id.*
48. 531 N.E.2d 486 (Ind. 1988) (Givan, J., writing for the majority).
49. *Id.* at 490.
50. *Id.* at 493 (DeBruler, J., dissenting).
51. *Id.* at 489.
52. *Id.*
53. *Id.*
54. *Id.*
55. The defendant was ultimately convicted for possession with intent to deliver cocaine, possession of Diazepam, and carrying a handgun without a license. *Id.*
56. Justice DeBruler, dissenting, emphasized that the police officers had not even attempted to get a search warrant. *Id.* at 494.

entry into the room.[57] Once inside, the officers observed scales with a white powder on it and arrested Orth.[58]

The defendant argued on appeal that the trial court erred in denying his motion to suppress the evidence found in the motel room, contending that not only was there no probable cause for his arrest, but also that the warrantless search of the motel room violated his right against unreasonable searches and seizures guaranteed by the fourth amendment.[59]

In a decision characterized by Justice Shepard[60] in his dissent as a "rogue, far enough outside the mainstream of fourth amendment jurisprudence that it will not serve as precedent," the majority concluded the warrantless entry proper because of the combination of two factors: probable cause and exigent circumstances.[61] The majority reasoned that because the defendant and Orth still occupied the room, exigent circumstances existed.[62]

The fact that police may have probable cause to believe an offense has been or is being committed is not an exception to the warrant requirement.[63] The *Bergfeld* opinion is contrary to the basic constitutional rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the fourth amendment - subject only to a few specifically established and well-delineated exceptions."[64] Thus, *Bergfeld* represents such a radical departure from traditional fourth amendment analysis that its value as precedent is questionable.

In another case apparently outside the mainstream of fourth amendment law, the Indiana Court of Appeals, in *Snyder v. State*,[65] held that

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57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 495.

61. *Id.* at 490.

62. As Justice DeBruler in his dissent correctly points out, the defendant was in fact not in the room, but rather was already in police custody. *Id.* at 493-94 (DeBruler, J., dissenting). Furthermore, there was no reasonable basis for the police to believe that Orth was going to flee or destroy evidence. Quite the contrary: the occupants of the room had indicated their desire to stay another night, and Orth had no knowledge of the defendant's arrest. *Id.* Probable cause is not the equivalent of exigent circumstances.

63. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Robles v. State, 510 N.E.2d 660 (Ind. 1987). In order to justify a warrantless entry and search of a residence, exigent circumstances must exist in addition to probable cause. Exigent circumstances include: "(1) risk of bodily harm or death; (2) to aid a person in need of assistance; (3) to protect private property; (4) actual or imminent destruction or removal of evidence before a search warrant may be obtained." Sayre v. State, 471 N.E.2d 708 (Ind. Ct. App. 1984).

64. *Coolidge*, 403 U.S. 443, 454-55 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

65. 538 N.E.2d 961 (Ind. Ct. App. 1989).

making a U-turn before reaching a roadblock is a specific and articulable fact justifying a *Terry* stop.[66] In *Snyder*, a police officer pursued the defendant who made a U-turn approximately 100 yards from the roadblock, and eventually arrested him for driving while intoxicated.[67] The parties stipulated that the driver had committed no traffic violations, nor was he driving erratically.[68]

Citing *State v. Garcia*,[69] the court determined that "inclusion of a no U-turn policy into the [roadblock] procedure further strengthens the degree to which the public interest is advanced"[70] and thus justifies the increased interference with an individual's liberty. However, the court acknowledged this new rule will create problems in certain circumstances, and only upon a case-by-case basis can the court determine if the officer's actions are reasonable.[71]

As an example of the type of difficulty this rule could pose, the court in *Snyder* stated:

> [T]he rule does not allow for cases where drivers come within a 'reasonable distance' of the roadblock, but the driver's conduct does not arouse a reasonable suspicion. For example, if the driver of an automobile drove within one hundred (100) yards of the roadblock and turned off onto another street, the officer would be entitled to stop the driver even if the driver's home was located on the street.[72]

In cases such as these, the court offered the following analysis to justify the stop: the avoidance of a roadblock by making a U-turn raises a "specific and articulable fact" which in turn gives rise to a reasonable suspicion on the part of an officer that the driver may be committing a crime, entitling the officer to detain a driver.[73]

Snyder appears to be a result-oriented case. The majority's attempt to distinguish between a U-turn and a turn-off is weak. In both situations, no crime nor infraction has been committed, and the officer is unaware of the driver's reason for turning.

Furthermore, as Judge Conover emphasizes in his dissent, in Indiana investigatory stops are not permitted upon an officer's suspicion alone.[74]

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66. *Id.* at 966.
67. *Id.*
68. *Id.*
69. 500 N.E.2d 158 (Ind. 1986).
70. Snyder v. State, 538 N.E.2d 961, 965-66 (Ind. Ct. App. 1989).
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 967 (Conover, J., dissenting).

The dissent implied that this was another example of the court being swept away by the anti-drunk driving campaign, and symbolizes the current unspoken policy that the overriding concern in Indiana is to arrest drunk drivers, no matter what the costs. Judge Conover wrote:

> If we are going to permit stops on no more than a police officer's hunch, we should forthrightly say a private citizen may not invoke the Fourth Amendment's protection whenever he drives an automobile because the danger to the public from drunk drivers transcends private constitutional rights. I find such an unqualified statement sobering and unwarranted to say the least. I would state to the contrary. We must do more than hum the Fourth Amendment's tune, we must loudly sing its lyrics at every available opportunity, if it is to survive in any meaningful form.[75]

The United States Supreme Court has recently granted certiorari to review the constitutionality of roadblocks and other related issues.[76] In light of this, the long-term significance of *Snyder* may be undermined or strengthened.

In *Williams v. State*,[77] the Indiana Court of Appeals found a search warrant insufficient because the affidavit upon which it was based did not provide sufficient information from which the judge could determine that probable cause existed.[78] Specifically, the affidavit was defective because it was based upon an informant's tip which failed to provide a statement concerning how the informant knew the listed items were located at the named residence.[79]

However, the court in *Williams* determined that the inadequacies in the affidavit were of form rather than substance, because testimony at the suppression hearing disclosed that the informant had actually seen some of the designated items at the residence.[80] The court found the *Leon*[81] good-faith exception applied and thus the evidence seized was properly admitted.

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75. *Id.* at 967-68.

76. Michigan Dep't of State Police v. Sitz, 88-1897, *argued*, February 27, 1990.

77. 528 N.E.2d 496 (Ind. Ct. App. 1988).

78. *Id.* at 499.

79. *See* Illinois v. Gates, 462 U.S. 213 (1983) for the law describing the requirements when an affidavit is based upon an informant's tip. In *Gates*, the United States Supreme Court stated that all the given circumstances must be set forth in the affidavit when based upon hearsay, including the "veracity" and "basis of knowledge" of the person supplying the hearsay information. *Id.* at 238.

80. *Williams*, 528 N.E.2d at 499.

81. United States v. Leon, 468 U.S. 897 (1984).

Dissenting, Judge Shields wrote that the affidavit was so unquestionably deficient that the presumption that the magistrate was detached and neutral was lost.[82] "Otherwise stated, the warrant could have been issued only by a magistrate who had wholly abandoned his or her judicial role. For that reason, the good faith exception is unavailing."[83]

Judge Shields' language in her dissent is unique because there are virtually no cases in the country which blame the magistrate for the failure to discern whether the affidavit is defective. In the seminal case of *United States v. Leon*,[84] which established the federal good-faith exception to the exclusionary rule,[85] Justice White, writing the majority opinion, opined that "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."[86] But as Judge Shields emphasized, the exception does not apply when the judge or magistrate abandons his or her neutral role; and accordingly, the items seized should have been suppressed.[87] Of significance is the willingness of Judge Shields to dispose of a case on grounds not forcefully argued in virtually any case.

In *State v. Jorgensen*[88] and *State v. Pease*,[89] the Indiana Court of Appeals affirmed the order of the trial court suppressing illegally seized evidence. At issue in *Jorgensen* was the propriety of a four-hour warrantless search by officers who were called to the defendant's house to investigate a shooting.[90] Upon arrival, investigators discovered that the defendant's husband was shot dead. The officers told the defendant, Vonda, that they intended to search the residence, and she did not object.[91] At no time did they ask Vonda's permission to search, and the resulting four-hour search resulted in the discovery of evidence which implicated Vonda in her husband's murder.[92]

The issue before the court of appeals in *Jorgensen* was whether Vonda, by acquiescing to the search, had consented to the search. While recognizing that express consent is not a requirement for a valid consent search,[93] the court held that because all the facts indicated that Vonda

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82. *Williams*, 528 N.E.2d at 501.
83. *Id.*
84. 468 U.S. 897 (1984).
85. The *Leon* good faith exception to the exclusionary rule was specifically adopted in Indiana in Blalock v. State, 483 N.E.2d 439 (Ind. 1985).
86. *Leon*, 468 U.S. at 916.
87. *See* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979).
88. 526 N.E.2d 1004 (Ind. Ct. App. 1988).
89. 531 N.E.2d 1207 (Ind. Ct. App. 1988).
90. 526 N.E.2d at 1004.
91. *Id.* at 1005.
92. *Id.*
93. *See* Harper v. State, 474 N.E.2d 508, 512 (Ind. 1985).

in no way assisted the search, the State had failed to meet its burden of showing that Vonda had freely and voluntarily given her consent.[94] A failure to object to a suggested search is not equivalent to consent.[95]

In *Pease*,[96] the Indiana Court of Appeals affirmed the decision of the trial court to suppress evidence seized when an officer improperly frisked the defendant, a driver of an automobile justifiably stopped for an equipment violation.[97] After stopping, the driver exited the automobile, at which time the officer frisked him and discovered amphetamines. In accordance with *Terry v. Ohio*,[98] the court held that because the officer had no particularized belief that the driver was armed and presently dangerous, the frisk amounted to an improper, generalized search.[99] The state argued on appeal that the frisk was justified as a search incident to a lawful arrest. The court correctly rejected this argument, noting that because Pease's arrest occurred after the frisk, it could not function as authority for the search.[100]

III. Discovery

Criminal discovery in Indiana and elsewhere is usually commenced when the defense receives a copy of the charging information or indictment, along with the supporting probable cause affidavit. These two documents alone inform the defense of critical facts, and the absence of material information in the charging document can be the basis of a dismissal.[101]

In *Locke v. State*,[102] the Indiana Court of Appeals rejected the argument of the state that a defect in the charging information, here the absence of the victim's name, was cured by incorporating the accompanying probable cause affidavit and a copy of the victim's nineteen

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94. *Jorgensen*, 526 N.E.2d at 1007.

95. Other mitigating factors are those that appear in Harper v. State, 474 N.E.2d 508 (Ind. 1985) (defendant's wife was present during the search and assisted an officer by finding paper bags in which to place seized items); Lewis v. State, 285 Md. 705, 404 A.2d 1073 (1979) (defendant left his house key with a neighbor for the purpose of giving the police access to his home for a search); State v. Fredette, 411 A.2d 65 (Me. 1979) (defendant returned to the house twice while the search was occurring and accompanied an officer with inventoried items).

96. State v. Pease, 531 N.E.2d 1207 (Ind. Ct. App. 1988).

97. *Id.* at 1212. The equipment violation was a badly cracked windshield.

98. 392 U.S. 1 (1968).

99. *Pease*, 531 N.E.2d at 1212.

100. *Id.*

101. *See* Ind. Code § 35-34-1-2 (1988), which sets forth the requisite contents of an information.

102. 530 N.E.2d 324 (Ind. Ct. App. 1988).

page statement.[103] In holding the trial court erred in denying the defendant's motion to dismiss, the court ruled that Indiana Code section 35-34-1-2, which sets forth the requisite contents of an information, does not contemplate incorporation by extraneous materials.[104] Accordingly, in Indiana a defective information cannot be cured by specifics contained in other material received through discovery.

Criminal discovery is undergoing a monumental revolution, due in part to advanced technological developments. DNA testing will have a great impact on current law regarding the availability of public funds to employ expert witnesses to conduct independent tests on behalf of indigent defendants. Recently, the Indiana Supreme Court rejected a defendant's appeal based upon the assertion that the trial court erred in refusing to furnish him with funds to employ expert witnesses.[105]

In *Graham v. State*,[106] the defendant was accused of rape, criminal deviate conduct, and confinement.[107] At trial, the state produced two medical experts, both of whom performed various tests to determine the presence of sperm and the chemical makeup of body fluids taken from the victim.[108] The forensic scientist for the state testified that the samples taken from the victim's body "were consistent with what one would find in eighty percent of the population."[109]

The Indiana Supreme Court reasoned that because the expert's testimony was "inconclusive," the trial court did not abuse its discretion in refusing to appoint an expert to examine the samples on behalf of the indigent defendant.[110] Yet the determination of the court that the evidence was "inconclusive" is not supported by the record, nor is it logical. The trial below was a jury trial, and it was in the sole province of the jury to determine the weight to be given to the evidence. Simply because the reviewing court, which purports to abstain from weighing the evidence, decides for itself such evidence is inconclusive is not a valid reason for denying the defendant's request for the appointment of an expert.[111]

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103. *Id.* at 325.

104. *Id.*

105. Graham v. State, 535 N.E.2d 1174 (Ind. 1989).

106. 535 N.E.2d 1174 (Ind. 1989).

107. *Id.* at 1175. The defendant was ultimately convicted of rape and confinement.

108. *Id.* at 1175. Timothy Hagmaier, a medical technologist, testified that the tests he performed demonstrated the presence of a male enzyme. James Romack, a forensic serologist for the Indiana State Police, testified that his tests determined that the victim was a secretor. *Id.*

109. *Id.*

110. *Id.* at 1175-76.

111. It is impossible to hypothesize what weight the jury may have given expert testimony proffered by the defendant, nor even what the testimony may have been. The

The impact of DNA testing on cases such as *Graham* cannot be exaggerated. Because DNA evidence is supposedly foolproof and can demonstrate guilt or innocence, competent counsel will routinely ask for a private DNA test. It will be hard for the court to justify denial of funds for such tests. Thus, the cost of public defense will substantially increase in the very near future.

The preservation of evidentiary material which may be exculpatory is not required under the fundamental fairness requirement of the Due Process Clause, absent a showing of bad faith on the part of the police, according to a United States Supreme Court decision[112] recently applied in Indiana.[113] In *Arizona v. Youngblood*,[114] the Supreme Court refused to interpret the fundamental fairness requirement of the due process clause as imposing on the state[115] an undifferentiated and absolute duty to retain and preserve all materials or evidence that might be of evidentiary significance so as to preserve the defendant's constitutionally guaranteed access to evidence in discovery.[116] The Court stated that unless a criminal defendant can show bad faith on the part of the police, *i.e.*, the state, the failure to preserve potentially useful evidence does not constitute a denial of due process of law.[117] In *Youngblood*, the Court determined that the officer's failure to refrigerate the victim's clothing and perform tests is merely negligence, as none of the information was concealed from the defendant, and the clothing and semen sample were made available to defendant's experts.[118]

Youngblood imposes on the defendant the burden of establishing bad faith on the part of the state, an almost insurmountable burden when the only evidence which would have a tendency to prove that fact either has been destroyed or is in the exclusive possession of the state and is nondiscoverable.

Applying *Youngblood*, the Indiana Supreme Court, in *Madison v. State*[119] determined that no due process violation occurs with "the failure

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defendant was denied a fair trial by forcing him to go to trial with the testimony of the state's expert witnesses solely. While the appointment of experts for indigent defendants is within the discretion of the trial court, the trial court has a duty to appoint experts except when such expense would be needless, wasteful or extravagant. For all practical purposes, *Graham* stands for the proposition that due process is afforded the indigent defendant only when the reviewing court determines *de novo* that the state's evidence is "inconclusive."

112. Arizona v. Youngblood, 109 S. Ct. 333 (1988).
113. Madison v. State, 534 N.E.2d 702 (Ind. 1989).
114. 109 S. Ct. 333 (1988).
115. The term "state" in this case means the arm of the state, *i.e.*, the police.
116. *Youngblood*, 109 S. Ct. at 337.
117. *Id.*
118. *Id.*
119. 534 N.E.2d 702 (Ind. 1989).

of the state to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant," provided the defense makes no showing of bad faith on the part of the police.[120] In *Madison*, the court reasoned that because the evidence would not have been exculpatory,[121] its omission had no prejudicial impact on the defendant.[122]

A cursory glance at *Madison* would seem to indicate that the court determined that the burden of establishing prejudice in the omission of exculpatory evidence because it was not preserved by the state rests with the defendant. Yet any language in the opinion to support such a conclusion is dicta; the court did not have to reach the question of how the burdens should be parcelled out in a destruction of evidence case.[123] The court avoided deciding that issue by holding that the evidence was in fact not exculpatory.

In a concurring opinion, Justice Debruler in *Madison* suggested that "once the defendant shows that the government has destroyed evidence of an exculpatory nature, the burden should be upon the government to establish the absence of prejudice."[124] Furthermore, as Justice Blackmun reasoned in his dissenting opinion in *Youngblood*, placing the burden on the defendant to show bad faith is fundamentally inconsistent with the defendant's constitutional guarantee to a fair trial.[125]

IV. Confessions and Admissions

Two critical Indiana cases concerning the voluntariness of confessions were decided in the survey period. Unfortunately, both ignore practical realities, and are sure to lead to an increasingly frustrated criminal bar. Following on the heels of these two cases is a United States Supreme

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120. *Id.* at 707 (quoting Arizona v. Youngblood, 109 S. Ct. 333, 342 (1988)).

121. The court determined the omitted evidence would not have been exculpatory on the facts of the case. *Madison* involved a stabbing, in which one of the knives found on the scene of the crime was not dusted for fingerprints, and the defendant was claiming self-defense. 534 N.E.2d at 706-07. The court stated that "evidence of [the deceased] fingerprints on the knife would not have been exculpatory to appellant because it was established at trial that the knife belonged to [the deceased]." *Id.* at 707.

122. *Id.*

123. *See* Johnson v. State, 507 N.E.2d 980 (Ind. 1987), where the same issue was left unresolved because of an evenly divided court.

124. 534 N.E.2d at 707.

125. Arizona v. Youngblood, 109 S. Ct. 333, 345 (1988). Additionally, Justice Blackmun criticized the majority for its reliance on the good faith/bad faith test stating that there is no bright-line test for determining good faith or bad faith, and placing the burden on the defendant to demonstrate bad faith essentially creates an unsurmountable burden. *Id.* at 342 (Blackmun, J., dissenting).

Court case which, when combined with the Indiana cases, is particularly problematic given the uncertain application of the law.

In *Duckworth v. Egan*,[126] the United States Supreme Court legitimized a variation of the traditional *Miranda* warning.[127] At issue was the propriety of the following words: "You have the right to remain silent. Anything you say can be used against you in court. You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.*"[128] In an opinion destined to create chaos, the Court determined that the italicized language did not render the *Miranda* warning of right to counsel inadequate.[129] Rather, the Court reasoned that the language merely answers the anticipated question of when counsel is appointed and neither suggests that only those persons who can afford an attorney have the right to have one present before answering any questions nor that if the accused does not go to court he is not entitled to counsel at all.[130]

The legitimization of *Miranda* deviations will undoubtedly lead to an increase in litigation. The more liberties police officers take in designing the warning, the more liberties will be lost by defendants, many of whom do not understand traditional *Miranda* warnings. This will create a plethora of defendants waiving rights without making a truly informed consent to do so.[131] Inevitably, more and more people will be convicted on the basis of statements made involuntarily, in that they were not made after an intelligent waiver of the right to remain silent or to have an attorney present.

Usually, the invocation of the right to an attorney bars all further questioning, or at least is grounds for suppression. Yet recently the

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126. 109 S. Ct. 2875 (1989).

127. *Id.*

128. *Id.* at 2877 (emphasis in original).

129. *Id.* at 2880.

130. *Id.*

131. Martin v. State, 537 N.E.2d 491 (Ind. 1989) applied the rule announced the prior year in Chase v. State, 528 N.E.2d 784 (Ind. 1988), that statements made to an officer concerning a possible plea bargain are admissible and are not privileged communications relating to the plea bargaining process, when certain conditions are met. *See infra* notes 139-42 and accompanying text. In *Martin*, the defendant satisfied the first prong of the *Chase* test in that he had been charged when he made statements offering a bargain, but the second prong was not satisfied as the officer contacted did not have authority to bargain on behalf of the state, nor did he purport to have such authority. Even though the officer asked some preliminary questions, there was no reason to believe he was in a position to bargain. 537 N.E.2d at 493-94.

Indiana Supreme Court determined in *Lord v. State*[132] that because the defendant had made a full confession before inquiring about a lawyer, and because the content of the subsequent statement did not contradict or add anything to the prior statement, no reversible error occurred.[133]

In *Lord*, the defendant voluntarily went to the police to speak with them concerning the death of an acquaintance.[134] The defendant claimed his subsequent confession was involuntary, as the product of coercion, because the interrogating officer proposed that if the defendant would talk they would promise that a deal would be cut with the prosecuting attorney.[135] The officers stated "If I could promise you . . . if I could promise you . . . if I could promise you he'd [the prosecutor] cut a deal with you, would you then talk and tell the truth?"[136] This was followed by a statement by the officer "[I]f I can get him down here, would you tell the truth, if he'd cut you a deal?"[137]

The Indiana Supreme Court rejected the defendant's argument that the officer's statements induced him into making incriminating statements because of his improper promises. The court determined that the officer was merely asking "what if" questions, and as such did not constitute improper promises.[138] The decision of the court ignores reality; police make these statements to suspects for the purpose of inducing them to make incriminating statements. When the entire context of the conversation is examined, it becomes clear that the investigating officer in fact induced the defendant to make statements by his promise to try to cut a deal for him. However vague the officer's words may have been, it does not matter, because in fact it produced the desired result - the defendant confessed.

It has long been recognized that communications relating to plea bargains are privileged.[139] Yet the scope of this privilege has been seriously maligned in *Chase v. State.*[140] In *Chase*, the Indiana Supreme Court held that statements made by a defendant to a police officer prior to the existence of any charge against him, and made to one without authority to enter into a binding plea agreement are not privileged and therefore are admissible.[141] The court reasoned that such statements are

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132. 531 N.E.2d 207 (Ind. 1988).
133. *Id.* at 209.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *See* IND. CODE § 35-35-3-4 (1988).
140. 528 N.E.2d 784 (Ind. 1988).
141. *Id.* at 786.

not part of the plea bargaining process pursuant to Indiana Code section 35-35-3-4, and hence do not fall within the rule that statements which are part of plea bargaining process are inadmissible at a subsequent trial.[142]

Especially troubling in *Chase* is the court's myopic idealism of real world considerations. The court stated that "the plea bargaining process does not start until persons having the authority to make a binding agreement have agreed to negotiate."[143] However, those inexperienced individuals unfortunate enough to be confronted by a police officer in connection with a criminal investigation do not know that police do not have authority to enter into plea agreements. Worse, many police use their apparent authority to coerce from individuals incriminating statements. Compounding the problem is the fact that many prosecutors will not enter into plea negotiations if the arresting officer protests strongly. This means that in the course of an investigation, officers are free to set mental traps, designed to catch unwary individuals making incriminating statements.

V. Trial Procedure

Three recent cases address issues which arise in jury trials.[144] In *Minniefield v. State*,[145] the Indiana Supreme Court expanded its interpretation of *Batson v. Kentucky*,[146] and held that it was error for the trial court to deny the defendant's motion for a mistrial on the basis of the purposeful exclusion of black jurors.[147]

In *Minniefield*, the prosecutor exercised six peremptory challenges to strike one white and five black members of the panel, leaving only one black person on the jury panel of twelve.[148] The defendant moved for a mistrial. The prosecutor responded that his reasons for striking the black jurors would become apparent at trial.[149] The court reserved

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142. *Id.*

143. *Id.*

144. Recently the Indiana Court of Appeals ruled that in a bench trial, the proper motion for judgment at the close of the state's case is not a Trial Rule 50 motion for judgment on the evidence, but rather a Trial Rule 41(B) motion for involuntary dismissal. State v. Vowels, 535 N.E.2d 146 (Ind. Ct. App. 1989). In *Vowels*, the court held that the trial court may weigh evidence and judge the credibility of the witnesses, and the establishment of a prima facie case by the state does not require the trial court to find for the state. *Id.* at 147. *See also* State v. Mayfield, 536 N.E.2d 294 (Ind. Ct. App. 1989).

145. 539 N.E.2d 464 (Ind. 1989).

146. 476 U.S. 79 (1986).

147. *Minniefield*, 539 N.E.2d at 465.

148. *Id.*

149. *Id.*

judgment on the motion, and at the close of evidence, the defendant renewed his motion for a mistrial.[150]

In response, the prosecutor stated that he had struck the jurors for "strategic purposes" because he feared the black jurors would take offense at the racist jokes attributed to the victim.[151] The trial court denied the motion for mistrial, and the defendant contended this constituted reversible error.

In determining whether it was error for the state to use its peremptory challenges to strike members of a race, the court in *Minniefield* reviewed the recent Supreme Court decision which established a three-prong test for determining a violation of equal protection claims in jury selection. In *Batson v. Kentucky*,[152] the Court held that a race-based equal protection violation in jury selection may be established solely from the state's exercise of peremptory challenges.[153] Once the defendant demonstrates that he is a member of a cognizable race and that the state has used its peremptory challenges to strike members of his race, an inference of purposeful discrimination arises and the burden shifts to the prosecutor to come forward with a neutral explanation.[154]

The Indiana court in *Minniefield* applied *Batson* and determined that a "neutral" explanation does not mean "justifiable on strategic grounds."[155] Rather, it means "neutral with regard to the struck juror's group identity" - here, race.[156] The court found that the trial court erred when it failed to grant the defendant's request for a mistrial on the basis of the state's "grossly disparate use of its challenges."[157] In the end, the prosecutor's excuse for its use of peremptory challenges was race-based and therefore violated the defendant's equal protection rights.

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150. *Id.*

151. *Id.* During the robbery, two pieces of paper fell out of the victim's pants. Printed on both were racist jokes, one targeting blacks, and the other targeting Hispanics. *Id.*

152. 476 U.S. 79 (1986).

153. *Id.* The *Batson* test is as follows:

> To [establish a denial of equal protection] the defendant must show: (1) he is a member of a cognizable racial group; (2) the prosecutor has peremptorily challenged members of the defendant's race; and (3) these facts and other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury because of their race. By showing these three factors the defendant raises an inference of purposeful discrimination which requires the State to come forward with a neutral explanation for challenging the veniremen; the explanation need not rise to the level required to justify a challenge for cause. *Id.* at 96.

154. *Id.*

155. 539 N.E.2d at 466.

156. *Id.*

157. *Id.*

In *Hicks v. State*,[158] the Indiana Supreme Court adhered to its earlier ruling in *Hatchett v. State*,[159] that sharing by co-defendants of peremptory challenges as a consequence of joinder can make joinder an abuse of discretion if "actual prejudice" can be shown.[160] In *Hicks*, the defendant failed to show actual prejudice, as the defendant failed to state how he was harmed by the presence of any particular juror on the panel, nor did he present a transcript of *voir dire* in the record.[161] Hence, *Hicks* represents the continuing caution of the court, although dicta, that forcing defendants to join can be harmful in jury trials, leaving the door open for reversal if the defendant can show harm.

The final significant case in this survey period which concerns jury trials in criminal causes is *Mareska v. State*.[162] In a case of first impression, the Indiana Court of Appeals held that the sixth amendment to the United States Constitution is violated in a trial for a misdemeanor committed outside the city limits where the jury is composed entirely of qualified voters from within the city.[163]

In *Mareska*, the defendant was charged with disorderly conduct for an incident which occurred in Starke County, Indiana.[164] The charging affidavit was filed in the Knox City Court.[165] The city court denied the defendant's motion to dismiss for lack of jurisdiction, and a jury found the defendant guilty.[166] Mareska appealed the city court conviction, and a *de novo* trial before the Starke Circuit Court similarly resulted in conviction.[167]

While the court found that this improperly paneled jury violated Mareska's sixth amendment rights to an impartial jury drawn from the district where the alleged crime was committed,[168] no remedy was required as the defendant subsequently received a fair trial before the circuit court jury selected from the county where the alleged crime occurred.[169]

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158. 536 N.E.2d 496 (Ind. 1989).
159. 503 N.E.2d 398 (Ind. 1987).
160. 536 N.E.2d at 499.
161. *Id.*
162. 534 N.E.2d 246 (Ind. Ct. App. 1989).
163. *Id.* at 250.
164. *Id.* at 247.
165. *Id.*
166. Throughout the city court proceedings, the defendant refused to personally appear in court, maintaining his jurisdictional objection. *Id.*
167. *Id.* at 248.
168. The relevant part of the sixth amendment reads "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ." U.S. CONST. amend. VI.
169. 534 N.E.2d at 250.

It is significant that the court is willing to reach the constitutional issue. Generally, reviewing courts will not decide a constitutional issue if the case can be resolved by other means. Nonetheless, the court reasoned that because this was a "classic case of an error that is 'capable of repetition, yet evading review,'"[170] the merits of the constitutional issue necessitated a resolution.

Often upon review of a decision of a trial court, the appellate court finds error, but determines the appellant's failure to demonstrate prejudice renders the error harmless. This was precisely the situation in *Diggs v. State*,[171] where the Indiana Supreme Court found harmless the suppression of a defense witness' testimony and the subsequent refusal by the trial court to admit the witness' deposition.[172]

In *Diggs*, at the close of the state's evidence and prior to the defendant's presentation of evidence, the prosecutor informed a defense witness that if he testified to "the same statements he did in his deposition, he [would] be charged, according to his own testimony."[173] The witness subsequently refused to testify when called as a witness on behalf of the defense, invoking the fifth amendment.[174] The trial court denied the defendant's request to admit the witness' deposition into evidence upon the state's objection that the defendant was not unavailable.[175]

On appeal, the defendant claimed that the prosecutor's action amounted to misconduct and that the trial court erred in refusing to admit the witness' deposition.[176] The court agreed, finding that the prosecutor by such conduct had improperly denied the defendant the use of the witness' testimony regardless of his good intentions.[177] The court stated that a prosecutor may not prevent or discourage a defense witness from testifying.[178] Once the witness has invoked his privilege against self-incrimination, the court committed error by refusing defense counsel's request to use the witness' deposition.[179]

While the defendant's right to call witnesses on his own behalf was violated by the prosecutor's misconduct, the court determined that such error was harmless, because the defendant failed to make a plausible showing that the improperly suppressed testimony would have been

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170. *Id.* (citing Ray v. State Election Bd., 422 N.E.2d 714 (Ind. Ct. App. 1981)).
171. 531 N.E.2d 461 (Ind. 1988).
172. *Id.* at 464.
173. *Id.* This conversation took place in the corridor outside the courtroom. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* Depositions are admissible if the deponent invokes his fifth amendment privilege to remain silent when called as a witness. *Id.*

materially favorable to his defense, and not merely cumulative.[180]

VI. Post-trial Procedure: The Death Penalty Cases

In the last year, the Indiana Supreme Court decided two death penalty cases of exceptional importance. The conflict presented by these two cases, both between the cases and with past decisions of the Indiana Supreme Court, demonstrates the failure of the court to develop a cohesive jurisprudential attitude toward imposition of the death penalty. These cases represent the *ad hoc* nature of the court's decision-making process in capital cases. Ultimately, the conflicts between these cases, and with prior cases, leave in doubt the very issues that the court has purportedly decided, thereby providing little guidance to the bench and bar.

In *Martinez Chavez v. State*,[181] the Indiana Supreme Court appeared to enunciate the standard against which judicial override of jury verdicts recommending a sentence other than death would be measured.[182] Specifically, the court held that in order to sentence a defendant to death after the jury has recommended against death, "the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the *offender and his crime*."[183] The court claimed that it held that a trial court cannot override the recommendation of the jury unless the facts meet this standard.[184]

In *Chavez*, the defendant had been tried jointly with a co-defendant by the name of Rondon.[185] The court concluded that Rondon was the leading personality in the crime.[186] Given the difference of the weight of the evidence between the two defendants, and apparently, different personal characteristics, the court concluded that the trial judge had not met the requisite standard.[187]

The decision in *Chavez* seemed to indicate a reluctance on the part of the court to allow judicial overrides. Yet, a mere six months later, the court appeared to retreat from its holding in *Chavez* in *Minnick v. State*[188].

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180. *Id.* at 464.
181. 534 N.E.2d 731 (Ind.), *reh'g denied*, 539 N.E.2d 4 (Ind. 1989).
182. *Id.*
183. *Id.* at 735 (emphasis added).
184. *Id.*
185. *Id.* at 732.
186. *Id.* at 735.
187. *Id.*
188. 544 N.E.2d 471 (Ind. 1989).

In *Minnick*, the defendant was charged with the offenses of murder, rape, and robbery.[189] A prior jury trial in 1982 resulted in the conviction and sentence of death.[190] The death sentence was reversed and remanded by the Indiana Supreme Court.[191] On remand, the defendant was again found guilty and sentenced to death.[192] On the subsequent appeal, the Indiana Supreme Court this time affirmed the death sentence.[193]

While there are many troubling aspects to the *Minnick* decision,[194] the most troubling is the fact that the court sustained the decision of the trial court to override the jury's recommendation against death.[195] In so doing, the court, as a practical matter, eviscerated the standard formulated in *Chavez*.

The trial court in *Minnick* found as an aggravating factor justifying a death sentence, the fact that the murder occurred while the defendant was committing the offenses of rape and robbery.[196] The court further found aggravating circumstances in that the decedent was apparently mutilated and violated after death.[197]

The Indiana Supreme Court, sustaining the trial court's override of the jury verdict, focused only on the defendant's crime. The court in its entire treatment of the appropriateness of the death penalty for this defendant, states:

> In the instance case, however, the evidence at trial revealed that appellant shares his culpability with no one. He alone bears criminal responsibility for this singularly brutal homicide in the course of which the victim was raped, sodomized, stabbed, bludgeoned, strangled, and electrocuted. *In light of these circumstances*, it seems fair to state that no reasonable person would find a death sentence inappropriate here.[198]

It is obvious that the court failed entirely to consider the circumstances surrounding the offender and his life. Thus, the court does not appear to follow its own standard in *Chavez*. Further, it seems to repudiate the many decisions in which the court has stated that the

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189. *Id.*

190. *Id.* at 473.

191. Minnick v. State, 467 N.E.2d 754 (Ind. 1984), *cert. denied*, Indiana v. Minnick, 472 U.S. 1032 (1985).

192. Minnick v. State, 544 N.E.2d 471 (Ind. 1989).

193. *Id.*

194. Among the troubling factors in *Minnick* is the fact that evidence pointing to Minnick's innocence was apparently minimized by both the trial and Supreme Court.

195. *Id.* at 482.

196. *Id.* at 481.

197. *Id.*

198. *Id.* at 482 (emphasis added).

circumstances of the offender's life will be considered in the court's independent review of the appropriateness of the death penalty.[199]

It is thus unclear whether there is an effective standard governing the circumstances under which a trial court might override a jury verdict. It appears the trial courts are free to override the jury verdict and, if the facts of the crime alone are particularly outrageous, the court may assume that the conviction will be affirmed by the Indiana Supreme Court.

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199. The Indiana Supreme Court has sent mixed signals when "reviewing" the appropriateness of the death penalty. In many cases, the review is so brief that the only logical conclusion is that the court was focusing only upon the crime. *See, e.g.*, Games v. State, 535 N.E.2d 530 (Ind. 1989). In other cases, the court does seem to independently consider the facts and the offender. *See, e.g.*, Cooper v. State, 540 N.E.2d 1216 (Ind. 1989). In a third line of cases, the court adopts a sufficiency of the evidence standard. *See, e.g.*, Moore v. State, 469 N.E.2d 1264 (Ind. 1985); Vandiver v. State, 480 N.E.2d 910 (Ind. 1985). However, in many cases there is no discussion of the appropriateness of the penalty. *See* Smith v. State, 465 N.E.2d 1105 (Ind. 1984); Canaan v. State, 541 N.E.2d 894 (Ind. 1989).