1991

Survey of Recent Developments in Indiana Criminal Law and Procedure

Bruce G. Berner
Valparaiso University School of Law

David E. Vandercoy
Valparaiso University School of Law

Survey of Recent Developments in Indiana Criminal Law and Procedure

BRUCE G. BERNER*
DAVID E. VANDERCOY**

I. INTRODUCTION

This Article surveys important developments in Indiana criminal law and procedure over the past year.[1] Section I highlights changes in the substantive law of crimes. As usual, this area is relatively static, and therefore the section is brief. Section II highlights changes in criminal procedure. As usual, this area is dynamic and the section is therefore much longer. Although this is a survey of Indiana law, many of the developments discussed are from the United States Supreme Court cases. This is necessarily so. No one can practice criminal law, in this state or in any other, without realizing that a great majority of procedures are driven by the United States Constitution, as that document is continually interpreted by the high court.

The Indiana appellate courts, too, devoted a large portion of their energies to issues of criminal procedure. Those decisions are highlighted as well.

II. SUBSTANTIVE CRIMINAL LAW

A. The Mens Rea Requirement

In *State v. Keihn*,[2] the Indiana Supreme Court faced the question of what *mens rea*, defined as "culpability" under the Model Penal Code and the Indiana Code,[3] must be proved when the pertinent statute is silent on the question. At issue was Indiana Code section 9-1-4-52(a), which provides as follows:

> A person may not operate a motor vehicle upon the public highways while his driving privilege, license, or permit is suspended or revoked. A person who violates this subsection commits a class A misdemeanor.[4]

---

* Professor of Law and Associate Dean, Valparaiso University School of Law.
** Professor of Law, Valparaiso University School of Law.

1. January 1990 to December 1990.
2. 542 N.E.2d 963 (Ind. 1989).
3. *See* IND. CODE § 35-41-2-2 (1988) and MODEL PENAL CODE § 2.02 (1962).
4. IND. CODE § 9-1-4-52(a) (1988 & Supp. 1990).

Does a person who drives without knowledge of suspension or revocation violate this provision? In *Keihn*, the court answered this question in the negative.[5]

Unless the legislature is constitutionally prohibited from defining a crime without an element of *mens rea*,[6] which the defendant did not argue, the court's task is to discover legislative intent. Because nothing in the legislative history of this statute spoke explicitly on this point, the court was placed in the position of applying general rules of legislative construction. Previous Indiana cases, however, pointed in opposing directions.[7]

The court in *Keihn* cited with approval sections from the 1974 Indiana Criminal Law Study Commission which were not formally adopted and, although it does not indicate such precisely, the court strongly suggests that future cases will be judged by the methodology of those provisions: for felonies and misdemeanors that are silent on *mens rea*, the assumption is that "wilfully" must be proved;[8] for infractions silent on *mens rea*, the assumption is that no *mens rea* need be proved.[9] The logic of this approach is evident. When a serious criminal penalty is involved, one cannot assume that the legislature would command punishment without proof of culpability. Strict liability in crime runs contrary to history.[10] If, on the other hand, the liability is for a noncriminal infraction, one cannot lightly assume that the legislature intended to put the state to the burdens usually associated with criminal prosecution. This approach, of course, applies only when legislative intent is unclear. The legislature is, within constitutional limits, free to specify whatever *mens rea* or lack thereof it wishes, provided it does so clearly and explicitly.

B. The Defense of "Impossibility"

In *State v. Haines*,[11] the Indiana Second District Court of Appeals was confronted by a beguiling juxtaposition of the old (the "impossi-

---

5. *Keihn*, 542 N.E.2d at 965.

6. There is considerable question whether a state could constitutionally remove proof of *mens rea* for traditionally serious crimes such as murder. *See, e.g.*, Patterson v. New York, 432 U.S. 197 (1977).

7. For example, under IND. CODE § 9-4-1-40 (1988), leaving the scene of an accident has been interpreted to require proof of knowledge of the accident. *See* Micinski v. State, 487 N.E.2d 150 (1986). On the other hand, under IND. CODE § 9-11-2-2 to -5 (1988), driving while intoxicated and causing death does not require proof of knowledge of intoxication. *See* Smith v. State, 496 N.E.2d 778 (Ind. Ct. App. 1986).

8. "Wilfully" means intentionally, knowingly, or recklessly. *See* IND. CODE § 35-41-2-2 (1988).

9. *Keihn*, 542 N.E.2d at 967.

10. *Id.* at 966.

11. 545 N.E.2d 834 (Ind. Ct. App. 1989).

bility'' defense to attempt) and the new (the AIDS virus). Police, responding to a call reporting a possible suicide attempt, discovered the defendant unconscious in a pool of blood. Upon regaining consciousness, the defendant informed the officers he had AIDS; threatened to "give it to them;'' shook his body for the express purpose of splashing his blood on the officers' faces and eyes; bit the officers and splashed his blood on the open wounds; and hit one officer in the face with a wig dripping with defendant's blood. On this evidence, the defendant was convicted by a jury of three counts of attempted murder. The trial court subsequently granted the defendant's motion for judgment on the evidence and vacated the conviction. The State appealed.

Judge Buchanan, writing for the court of appeals, reversed and remanded with instructions to reinstate the jury verdict. The appellate court examined the case for, *inter alia*, the defense of "impossibility."[12] The traditional approach to attempt differentiated "factual impossibility," which is not a defense, from "legal impossibility," which is a defense.[13] This distinction, which has puzzled generations of law students, is not an easy one to draw.[14] The distinction essentially is between trivial or temporary factual mistakes[15] and profound or permanently incurable mistakes.[16] This distinction became unimportant in states, such as Indiana, that adopted the Model Penal Code provisions on inchoate crimes.[17] Under those provisions, *neither* type of impossibility is a defense.[18] Judge

---

12. *Id.* at 838.

13. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 6.3 (2d ed. 1986).

14. There is no use trying to think of "factual impossibility" as entailing a factual mistake and "legal impossibility" as entailing a legal mistake. Defendants who think their actions are criminal when they are not (who might, in common parlance, be said to be making a legal mistake) simply have no criminal *mens rea* and thus need no "defense."

15. Mitchell v. State, 71 S.W. 175 (Mo. 1902) (defendant who shot toward a bed thinking the victim was there only to discover he was in another room).

16. Such as in the paradigmatic case of trying to kill someone who is already dead.

17. IND. CODE § 35-41-5-1 (1988).

18. This change was driven by the Model Penal Code drafters' radically different understanding of the fundamental purposes for inchoate crimes, including attempt. Whereas the common-law approach focused on preventing social harm (and, thus, was not troubled by defendants trying to kill dead people because no harm was possible), the Model Penal Code's inchoate crime provisions are aimed at identifying "manifestly dangerous persons." 2 MODEL PENAL CODE PART I COMMENTARIES § 5.01 (1985). Simply put, defendants who try to kill dead people are dangerous because they form a criminal *mens rea* and act on that intention. The Model Penal Code recognizes "inherent impossibility" — that is, choosing a method of committing a crime that is facially inappropriate to achieve the intended result (such as throwing darts at x's picture with the intent to kill x). *Id.* However, this "inherent impossibility" is not a defense even under the Model Penal Code, but simply a factor to mitigate the sentence. *Id.* In any event, "inherent impossibility" is

Buchanan's opinion makes it clear that impossibility is not a defense to attempt in Indiana.[19]

In *Haines*, the defendant also argued, and the trial court apparently agreed, that the defendant had not taken a "substantial step" toward commission of the crime, which is the test for the required "act" element.[20] However, as Judge Buchanan noted, this argument confuses the "act" requirement with the impossibility defense.[21] Not only did the defendant commit *sufficient* acts under the substantial-step test, he committed *all* the acts he intended.[22] In measuring acts, courts must adopt the defendant's perspective on reality, in this case, that biting and blood-splashing can infect the victim with a deadly disease.[23] To adopt some other reality (for example, that biting cannot transfer the AIDS virus) is to consider the "impossibility" question under the guise of an "act."

III. Criminal Procedure

A. *Arrest, Search, and Seizure*

1. The Beneficiaries of the Fourth Amendment.—In *United States v. Verdugo-Urquidez*,[24] federal officials searched, with the permission of Mexican authorities, the defendant's home in Mexico. The defendant was a foreign national and his only entry into the United States had occurred three days earlier when he was involuntarily forced into the United States under federal arrest. Clearly the warrantless search of his house would not pass muster under the fourth amendment;[25] however, the United States Supreme Court held 6-3 that the defendant was not included within the meaning of "the people" in the fourth amendment.[26] Had the defendant been a resident alien or even an illegal alien, the result might be different. However, the defendant had insufficient connection with the United States to claim the benefit of fourth amendment protection.[27] The dissent asserted that compliance with the fourth amend-

---

foreclosed in this case because expert testimony showed that one could, by actions similar to those of the defendant, infect a victim with the AIDS virus, and that such virus could produce the death of the victim. *Haines*, 545 N.E.2d at 841.

19. *Haines*, 545 N.E.2d at 838-39.
20. *Id.* at 836.
21. *Id.* at 838.
22. *Id.* at 841.
23. *Id.*
24. 110 S. Ct. 1056 (1990).
25. *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980).
26. *Verdugo-Urquidez*, 110 S. Ct. at 1064.
27. *Id.*

ment was an unavoidable correlative of the power to prosecute foreign nationals under United States penal laws.[28]

2. Reasonable Expectation of Privacy.—The Supreme Court has long recognized that homeowners, tenants, and paying hotel guests have a reasonable expectation of privacy in those spaces.[29] The Supreme Court in *Minnesota v. Olson*[30] extended the expectation of privacy to overnight, nonpaying guests in private homes.[31] The Court was careful to explain that its holding does not indicate that everyone lawfully on premises has this expectation.[32] In *Olson*, the defendant, an overnight guest of the homeowner, had interests sufficiently similar to paying guests in hotels, motels, and boardinghouses to receive fourth amendment protection.[33] However, nothing in the opinion suggests that daytime guests in a private home would, without more, gain this protection.

3. Search Incident to Arrest.—The most common type of a warrantless search is the search incident to lawful arrest.[34] The United States Supreme Court decided three cases in this area.

In *Smith v. Ohio*,[35] two policemen approached the defendant and his companion because the police were curious about the brown paper bag that the defendant was carrying which was marked "Kash n' Karry" and "Loaded with Low Prices." Clearly no probable cause existed for an arrest, and the State of Ohio made no *Terry*[36]-type stop-and-frisk argument. The State conceded that the officers were acting on a mere hunch.[37] When the defendant was stopped, the defendant threw the bag on the hood of his car and turned to face the police. The police opened the bag and discovered illegal paraphernalia. The State argued that this discovery justified the initial stop.[38] The Supreme Court held 9-0 that the fruits of a search cannot supply the probable cause for the arrest to which the search is then incident.[39] Although the Court did not use terms such as "bootstrap" or "circularity," such terms fairly characterize the argument the State of Ohio relied upon.

---

28. *Id.* at 1077 (Brennen, J., dissenting).

29. "Reasonable expectation of privacy" is the current test for determining whether police conduct is a "search." *See* Katz v. United States, 389 U.S. 347 (1967).

30. 110 S. Ct. 1684 (1990).

31. *Id.* at 1689-90.

32. *Id.* at 1687.

33. *Id.* at 1690.

34. Berner, *Search and Seizure: Status and Methodology*, 8 VAL. U.L. REV. 471, 534 (1974).

35. 110 S. Ct. 1288 (1990).

36. Terry v. Ohio, 392 U.S. 1 (1968).

37. *Smith*, 110 S. Ct. at 1289.

38. *Id.* at 1290.

39. *Id.*

Maryland v. Buie[40] is a significant case concerning the power of police to "sweep" a house incident to arrest. In *Buie*, two men had just robbed a Godfather's Pizza, and one was arrested in his home after fresh pursuit. After securing him, the police walked into the basement to look for the other perpetrator and found, instead, evidence of defendant's involvement in the crime, a red running suit. The United States Supreme Court held that, incident to an arrest in a house, the police may conduct a "protective sweep" of an area if they possess a "reasonable belief based on specific, articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene."[41] The Court rejected the government's request for an "automatic" right to make such a sweep incident to all arrests in homes,[42] but indicated in *dicta* that an automatic right exists to search "closets and other spaces immediately adjacent to the place of arrest from which an attack could be immediately launched."[43] This innocent sounding sentence likely will spawn much litigation. Outside this immediate area, however, the *Terry* "reasonable suspicion" standard is required.[44] So long as the police conduct a proper cursory check of only those places where persons might be hiding, anything that the police observe falls within the "plain view" doctrine and is admissible.[45]

New York v. Harris[46] raised a subtle question under the "fruit-of-the-poisonous-tree" doctrine.[47] Police arrested Harris in his home for murder. The police had probable cause but no warrant to enter his home; thus, the arrest violated the fourth amendment under the authority of *Payton v. New York*,[48] which requires a warrant to enter a private home to make an arrest, even though such arrest could be made without a warrant in any other place.[49] After being taken to the station, Harris made a Mirandized confession. The Supreme Court held 5-4 that the statement was not tainted by the *Payton* violation.[50] Unlike an arrest made without probable cause, the Court reasoned that the custody

---

40. 110 S. Ct. 1093 (1990).
41. *Id.* at 1099-1100.
42. *Id.*
43. *Id.* at 1098.
44. *Id.*
45. *See, e.g.*, Harris v. United States, 390 U.S. 234 (1968).
46. 110 S. Ct. 1640 (1990).
47. This doctrine, which has a variety of applications, provides that any product (such as statements or hard evidence) of prior illegal police behavior is tainted with such illegality and, thus, excluded. *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).
48. 445 U.S. 573 (1980).
49. *Id.* at 600.
50. *Harris*, 110 S. Ct. at 1644.

resulting from such arrest is not itself illegal after the arrestee is taken from his home.[51] The interest invaded is not a liberty interest, but a privacy interest centered in the home.[52] Indeed, the trial court ruled that statements Harris made while still in the home were inadmissible.[53] After the suspect is removed from the home, the taint is removed.[54] Of course, any statement taken after the defendant is removed from the home would have to comply with the fifth and sixth amendments.[55]

4. Third-party Consent.—Fourth amendment privacy interests can be lost through consent to search, including consent given by a third party.[56] The test for determining whether the third party had the power to give consent is whether the person giving consent had sufficient dominion and control over the space.[57] *Illinois v. Rodriguez*[58] raises the interesting problem of consent given by someone the police had every reason to believe was a co-occupant of the house but who had, in fact, recently moved from the residence. The Supreme Court held 6-3 that the consent was operative because police action which is reasonable, though mistaken, cannot be deterred and need not be remedied.[59] This case reinforces a critical fourth amendment lesson that the proper perspective from which to judge police conduct is the facts as they appear to a reasonable police officer.[60] When a police officer is reasonably mistaken, the officer's actions can only be sensibly judged by adopting the officer's perspective on reality. To judge such actions in light of facts not accessible to the officer is illogical. The converse is also true. A police officer who makes an unreasonable search of a house and is lucky to find contraband cannot defend the action based on the outcome of the search.

5. Automobile Inventories.—Florida v. Wells[61] is a case whose dicta is far more important than its holding. The Supreme Court previously had approved inventory searches of impounded vehicles including a search of closed containers, provided those searches were "routine" or "stan-

---

51. *Id.* at 1644-45.
52. *Id.* at 1643.
53. *Id.* at 1642.
54. *Id.* at 1643 (had Harris been arrested on the street, no violation would have occurred).
55. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (fifth amendment); Brewer v. Williams, 430 U.S. 387 (1977) (sixth amendment).
56. *See, e.g.*, United States v. Matlock, 415 U.S. 164 (1974).
57. *Id.* at 169-72.
58. 110 S. Ct. 2793 (1990).
59. *Id.* at 2800.
60. *Id.* at 2801.
61. 110 S. Ct. 1632 (1990).

dardized."[62] In *Wells*, the police opened a locked suitcase found in the trunk. The police department had no regulations guiding the officer's discretion in such matters. The Court held that an inventory without any guidelines gave too much discretion to police.[63] Guidelines clearly authorizing the opening of "all" containers, or "no" containers, or containers specifically described in the regulations would pass muster.[64] The Court suggested that some discretion on which containers to open may be left to the individual officer, and concluded with this language that threatens an exception to swallow the rule: It would be "equally permissible to allow . . . the opening of closed containers whose contents officers determine they are unable to ascertain from examining the container's exteriors."[65]

6. Stop and Frisk.—In *Alabama v. White*,[66] the police received an anonymous tip that the defendant would leave her apartment at a particular time, enter a particular car, and drive to a particular motel carrying cocaine in the car. Police staked out her apartment, followed her as she drove the predicted route, and stopped her as she approached the motel. The state conceded that this was a *Terry* stop requiring "reasonable suspicion."[67] The Court held that the anonymous tip, though insufficient to produce probable cause under *Illinois v. Gates*,[68] nevertheless produced reasonable suspicion for a *Terry* stop.[69]

In *Molino v. State*,[70] the Indiana Supreme Court had occasion to examine the initial phase of a police-suspect encounter in an airport setting with a "drug-courier profile," a recurrent situation that has deeply divided the United States Supreme Court.[71] The defendant, an Hispanic male, carrying only a leather handbag, "quickly" deplaned in Indianapolis from a flight originating in Florida, did not claim luggage, visited the restroom, and walked quickly outside to hail a taxicab. At this point, three officers, who had been monitoring the defendant, approached him. One displayed his badge and identification card, identified himself as a narcotics investigator, and inquired if he could ask

62. *See* Colorado v. Bertine, 479 U.S. 367 (1987); South Dakota v. Opperman, 428 U.S. 364 (1976).

63. *Wells*, 110 S. Ct. at 1635.

64. *Id.*

65. *Id.*

66. 110 S. Ct. 2412 (1990).

67. During the stop, the defendant consented to a search of the car that produced cocaine.

68. 462 U.S. 213 (1983).

69. *White*, 110 S. Ct. at 2415.

70. 546 N.E.2d 1216 (Ind. 1989).

71. *See, e.g.*, Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980).

several questions, to which the defendant consented. The defendant showed his identification and airline ticket which were unremarkable, and stated that he was a clothing buyer. The officer then asked if he could look inside the handbag. The defendant indicated agreement. During this search, the defendant exhibited nervousness. When asked if the defendant would consent to a search of his person, he responded, "I have drugs."[72] From this point on, the police followed all proper procedures. The defendant was convicted for possession of cocaine with intent to deliver.

The Indiana Supreme Court affirmed the conviction, 3-2, in an opinion written by Justice Givan.[73] The opinion leaves some doubt as to which of these two rationales is the decisive one: (a) the defendant had not been "seized" at the point he made the incriminating response; or (b) he had been "seized," but the seizure was proper under the stop-and-frisk doctrine. The Indiana Supreme Court cited *United States v. Mendenhall*,[74] a case remarkably similar on the facts, for the proposition that such questioning in an airport is not a seizure.[75] Only two justices, however, joined in that portion of the *Mendenhall* opinion, and later cases evidence a tendency of the United States Supreme Court to treat such confrontations as seizures.[76]

Molino is more tractable to a "no seizure" solution than cases like *Florida v. Royer*[77] in which the defendant was escorted by airport police to an interrogation room. In *Molino*, the interrogation and searches took place on an airport sidewalk. Even so, it is difficult to imagine that someone who is approached as Molino was by the three narcotics officers would, in any objective sense, feel "free to go," which is the acknowledged test for lack of a seizure.[78] Indeed, when the police asked for his "consent" to a personal search, Molino responded, "I have drugs."[79] This does not sound like the response of someone who believes he is in a friendly conversation from which he can leave at will.

Molino can be more fairly interpreted as resting on a finding that there existed reasonable suspicion for the stop. The Indiana Supreme Court stated: "The police officers were merely in a 'stop and frisk' situation at the time appellant volunteered the information that he was carrying drugs."[80] The dissenting opinions of Justices DeBruler and

---

72. *Molino*, 546 N.E.2d at 1217.
73. *Id.* at 1219.
74. 446 U.S. 544 (1980).
75. *Molino*, 546 N.E.2d at 1220.
76. *See, e.g.*, United States v. Sokolow, 109 S. Ct. 1581 (1989).
77. 460 U.S. 491 (1983).
78. *See* United States v. Mendenhall, 446 U.S. 544 (1980).
79. *Molino*, 546 N.E.2d at 1217.
80. *Id.* at 1219.

Dickson argue that the sparse facts of this case, even if they might be properly combined with other facts under a drug-courier profile, are simply not enough to produce reasonable suspicion.[81]

If the court based its decision on a finding of reasonable suspicion, recent United States Supreme Court decisions demonstrate the Court's willingness to find that reasonable suspicion is present on fewer facts than in the past. The facts in *United States v. Sokolow*[82] are somewhat stronger than in *Molino*, and perhaps decisively so.[83] The finding of reasonable suspicion in *Sokolow* was not, as the *Molino* court intimated, *because* of the drug-courier profile, but *in spite* of it.[84] The primary difficulty with the *Molino* opinion is that it does not attempt to make a case for reasonable suspicion based on the facts before it. The opinion addresses primarily the "no seizure" issue and then the events that occur after the incriminating response which were not an issue in the case. In *Molino*, the Indiana Supreme Court gave little justification for its stated holding.

7. Warrants.—Indiana Code section 35-33-5-8 provides that affidavits in support of search or arrest warrants now may be forwarded to the judge by facsimile transmission (FAX), and that the warrants may be returned by similar transmission.[85] This provision undoubtedly will save valuable time in situations in which time is of the essence. One ponders whether this will lead courts in close cases to be more insistent on the use of warrants because warrants now will be obtainable with less delay.

8. Drunk-Driving Roadblocks.—In a long-awaited decision, the United States Supreme Court in *Michigan Department of State Police v. Sitz*,[86] upheld (6-3) police roadblocks to monitor drivers for driving under the influence.[87] The Court employed the administrative-search balancing process by weighing the government's "special need" against the privacy loss resulting from the particular intrusion involved.[88] Statistics and other evidence of the mayhem caused by drunk drivers were found to outweigh the relatively minimal intrusion involved in such stops.[89]

---

81. *Id.* at 1220 (DeBruler, J., dissenting); *id.* at 1221 (Dickson, J., dissenting).
82. 109 S. Ct. 1581 (1989).
83. In *Sokolow*, the defendant paid $2,100 for two round trip tickets from a roll of $20 bills; he traveled under a name that did not match his telephone number; his original destination was Miami, where he stayed for only 48 hours; he appeared nervous; and he checked none of his luggage.
84. *Id.* at 1587.
85. IND. CODE § 35-33-5-8 (Supp. 1990).
86. 110 S. Ct. 2481 (1990).
87. *Id.* at 2488.
88. *Id.* at 2485.
89. *Id.* at 2486.

The Court addressed only the issue regarding the initial check of all drivers, and left questions concerning how much evidence justifies longer, more intrusive procedures for other cases.[90] Justice Stevens's dissent is intriguing. He would disallow random, unannounced roadblocks, but would permit regular, fixed, and anticipatable intrusions such as metal detectors at all subway entrances and breathalyzer checks at all toll-road entrances.[91]

9. The Plain-View Doctrine.—Horton v. California[92] put to rest the mysterious "inadvertence" requirement of the plain-view doctrine[93] by holding 7-2 that the fourth amendment does not require "inadvertence" during plain-view searches.[94] Thus, if the police have probable cause that a house contains a gun and illegal drugs, and obtain a warrant specifying only the gun, any drugs found during the search will be admissible under the plain-view doctrine provided that (1) the police were looking only in places where the gun could be found, and that (2) the police had not yet found the gun.[95] The Court points out that police have little incentive to omit items from warrant applications because each listed item will expand and never contract the scope of the search.[96]

B. Police Interrogation

The case of *Pennsylvania v. Muniz*[97] serves as a useful review of many well-established *Miranda* exceptions with only one new development. In *Muniz*, the defendant was arrested for drunk driving and was taken to the police station. He was asked a series of biographical questions (name, age, address, etc.) which he answered with slurred speech. The police videotaped a series of sobriety tests that the defendant failed miserably. The defendant was asked if he would take a breathalyzer test. He responded with a series of spontaneous admissions. When asked the calendar date of his sixth birthday, the defendant did not respond correctly. The defendant was not Mirandized.

The Supreme Court stated that the biographical questions, though conceded to be "custodial interrogation," were exempt from *Miranda*

---

90. *Id.* at 2485.
91. *Id.* at 2497-98 (Stevens, J., dissenting).
92. 110 S. Ct. 2301 (1990).
93. This requirement, which states that under the plain-view doctrine, police may not seize those things they anticipated finding, stems from Coolidge v. New Hampshire, 403 U.S. 443 (1971).
94. *Horton*, 110 S. Ct. at 2304.
95. *Id.* at 2309.
96. *Id.* at 2304-10.
97. 110 S. Ct. 2638 (1990).

under the "routine booking question" exception.[98] The defendant's behavior and slurred speech were outside *Miranda* because they were not "testimonial" or "communicative," but were instead physical evidence of the defendant's body motion and speech similar to voice and handwriting exemplars which have been long understood to be outside the fifth amendment.[99] The spontaneous statements falling within what many courts call the "blurting out" doctrine were admissible because they were not the product of "custodial interrogation."[100] One of the more common misconceptions is that *Miranda* warnings are required in all arrests. The rule is only that such warnings must be given if custodial interrogation is to follow.[101] All of these holdings are quite consistent with past cases.[102]

In *Muniz*, the Court held, however, that the answer to the "sixth birthday" question should have been suppressed.[103] Even though the prosecution argued that it only wanted the answer to show slurred speech and impaired mental activity, the Court held that the "content" of the answer was implicated,[104] and thus the answer was excluded from the voice-handwriting exemplar exception.[105] This holding leaves some questions unresolved. What would the Court hold if the question called for some mental acuity, for example, adding three-digit numbers in the head, but did not involve any of the suspect's biographical history? Would this example just be a different kind of field sobriety test?

In *Illinois v. Perkins*,[106] police placed an undercover agent, posing as an inmate, in the defendant's cell. The agent encouraged the defendant to talk about the crime, and the defendant gave a series of incriminating responses.[107] The Court held that *Miranda* did not apply because the coercion with which *Miranda* is concerned was not involved.[108] Until the defendant thinks he is being interrogated by a policeman, the "inherent compulsion" is absent.[109] However, had formal judicial proceedings al-

---

98. *Id.* at 2650.

99. *Id.* at 2644-45. *See also* United States v. Wade, 388 U.S. 218 (1967) (suspect can be compelled to participate in a lineup).

100. *See* Rhode Island v. Innis, 446 U.S. 291 (1980).

101. Miranda v. Arizona, 384 U.S. 436, 477-79 (1966).

102. *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984); United States v. Dionisio, 410 U.S. 1 (1973).

103. *Muniz*, 110 S. Ct. at 2646.

104. *Id.*

105. *See* United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplars); United States v. Mara, 410 U.S. 19 (1973) (handwriting exemplars).

106. 110 S. Ct. 2394 (1990).

107. *Miranda* warnings, of course, were not given as this tends seriously to undermine the ruse.

108. *Perkins*, 110 S. Ct. at 2397-98.

109. *Id.*

ready begun, the sixth amendment would have prohibited this police conduct.[110] Once again, the Rehnquist Court takes a different view of the fifth amendment *Miranda* protection from its sixth amendment protection against custodial interrogation emanating from the assistance-of-counsel clause.

The Court previously has held that under both the fifth and sixth amendments, once a suspect invokes his right to counsel, interrogation must cease and may not begin again unless initiated by the suspect.[111] In *Michigan v. Harvey*,[112] the Court held 5-4 that statements taken in violation of this rule may be used, without offending either amendment, to impeach the trial testimony of a defendant provided that the statement is given voluntarily.[113] The dissent pointed out, however, that under this case, after a suspect invokes counsel, there is little to deter police from continuing the interrogation because the defendant will rarely initiate further questions or cooperate after he has spoken with a lawyer.[114] The rationale for the majority's decision, as in cases of using nonMirandized statements to impeach,[115] is to discourage perjury.[116]

James v. Illinois[117] is an intriguing case which produced a surprisingly close 5-4 vote with Justice Brennan voting with the majority. In *James*, the defendant was arrested for murder and attempted murder. The arrest, as conceded by the State, was illegal.[118] The defendant, whose hair was short and black upon arrest, made the incriminating statement under police interrogation that his hair had been long and reddish-brown at the time of the incident and that he had cut it and dyed it to alter his appearance. Because this confession was the product of an unlawful arrest, the trial court suppressed it as fruit of the poisonous tree, a ruling that the State did not appeal. Under *Harris v. New York*,[119] the statement nevertheless would have been available to impeach the defendant if he testified inconsistently.[120] Prosecution eyewitnesses testified that the perpetrator they identified at the trial had reddish-brown long hair. During the defendant's case-in-chief, the defendant called his close friend who testified that on the day of the shooting, the defendant's hair was short and black. The defendant's statement was then introduced

---

110. United States v. Henry, 447 U.S. 264 (1980).
111. Edwards v. Arizona, 451 U.S. 477 (1981).
112. 110 S. Ct. 1176 (1990).
113. *Id.* at 1179.
114. *Id.* at 1188 (Stevens, J., dissenting).
115. *See* Harris v. New York, 401 U.S. 222, 226 (1971).
116. *Harvey*, 110 S. Ct. at 1180.
117. 110 S. Ct. 648 (1990).
118. *Id.* at 650.
119. 401 U.S. 222 (1971).
120. *Id.* at 225.

by the prosecution solely to impeach the testimony of this witness. Conceding that the use of the defendant's statement to impeach the defendant's trial testimony, had he testified, would be proper under *Harris*, the Supreme Court held that the statement may not be used to impeach other defense witnesses.[121] The Court reasoned that the risk of a perjury prosecution is a much more powerful deterrent to someone not already on trial for serious crime.[122] The dissent asserted that *Harris* should be extended to embrace impeaching defense witnesses other than the defendant, especially those closely associated with the defendant, to deter the defendant from maneuvering his way around *Harris*.[123]

Although both the majority and the dissent addressed the question in only a cursory way, classic understanding of evidence is that the refutation of one's statement with that of another is not, strictly speaking, sincerity impeachment.[124] If one person asserts mutually inconsistent statements, his credibility is *necessarily* called into question. If A says "red" at one time and "not red" at another, he *cannot* be telling the truth all the time. If, however, A says "red" and B says "not red," they cannot both be right, but one cannot determine whose credibility is necessarily called into question.

C. Discovery

In Indiana, discovery rights were expanded in *Hicks v. State*[125] to permit pretrial discovery of verbatim witness statements notwithstanding the claim that such statements were work product.[126] This holding overrules *Spears v. State*.[127] The primary rationale offered by the *Hicks* court to support the ruling was that verbatim witness statements must be viewed as potential substantive evidence under the rule of *Patterson v. State*.[128] Pursuing this logic, the court analogized verbatim witness statements to other exhibits such as photographs, videotapes, handwriting examples, diagrams, and other physical evidence; the discoverability of such similar physical evidence is unquestioned, even if prepared by counsel.[129] The court perceived that discovery of these statements, like

---

121. *James*, 110 S. Ct. at 652, 656.

122. *Id.* at 653.

123. *Id.* at 658 (Kennedy, J., dissenting).

124. E. CLEARY, MCCORMICK ON EVIDENCE § 47 (3d ed. 1984).

125. 544 N.E.2d 500 (Ind. 1989).

126. *Id.* at 504.

127. *Id.* *See* Spears v. State, 272 Ind. 647, 403 N.E.2d 828 (1980).

128. *Hicks*, 544 N.E.2d at 504. *See* Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975) (court permits the substantive use of prior statements of a witness who testifies and is available for cross-examination).

129. *Hicks*, 544 N.E.2d at 504.

discovery of other physical evidence, would improve the efficiency of the criminal justice system.[130] The culmination of this reasoning was the rejection of the work product doctrine as a shield to discovery.[131] The court appeared to question whether such statements are protectable work product by observing that the "essential function of the work product exception is to protect from disclosure an attorney's 'mental impressions, conclusions, opinions or legal theories.'"[132] The court probably does not believe that a verbatim witness statement falls within this definition.

The distinction between the two rationales is important. If *Hicks* means that such statements are work product, but discoverable, because the statement may be offered as substantive evidence under *Patterson*,[133] the parties' failure to designate the declarant of the statement as a potential witness could thwart pretrial discovery of the statement. This would result because submission of the statement as substantive evidence under *Patterson* would require the declarant to testify at trial.[134] If the declarant does not testify, the statement could not be admitted as substantive evidence.[135] Alternatively, if these statements are not work product, the ability to discover such statements would not be affected by the party's designation of potential witnesses.[136]

The breadth of the *Hicks* rule was demonstrated in *Crawford v. Superior Court of Lake County*.[137] In *Crawford*, the trial court directed

---

130. *Id.*

131. *Id.*

132. *Id.* (quoting Trial Rule IND. R. TRIAL P. 26(B)(3) (1990).

133. 263 Ind. 55, 324 N.E.2d 482 (1975).

134. *Id.* at 58, 324 N.E.2d at 484.

135. *See* Watkins v. State, 446 N.E.2d 949 (Ind. 1983).

136. Verbatim witness statements should be discoverable without regard to whether the State intends to call the relator-witness. The purpose of discovery is to promote truth-finding; it is not limited to determining the nature of the adversary's case. Moreover, a prosecutor is not a typical adversary. The prosecutor will have more resources available for preparation than will the ordinary defendant. A prosecutor is also atypical in that prosecutors are charged, in theory, with obtaining a fair result. Truth-finding and the likelihood of a fair result are enhanced if the stronger adversary, the prosecutor, is obligated to tender all relevant evidence.

137. 549 N.E.2d 374 (Ind. 1990). *Crawford* sheds some light on the exact basis of the earlier *Hicks* holding. The court in *Crawford* noted that the State's act of listing potential witnesses was a sufficient basis for assuming the witnesses would testify and that their prior statements would be relevant. *Id.* at 375-76. This analysis is necessary only if *Hicks* is predicated on the assumption that witnesses' statements are work product but are not protected because they may become substantive evidence if the witness testifies. Nevertheless, doubt remains because the trial court order that was affirmed in *Crawford* directed the State to produce all "statements by witnesses to police officers . . . ." *Id.* at 375. The opinion does not suggest that this particular order was confined to the statements of witnesses that the State intended to call at trial, although the trial court's first discovery order was so limited. *Id.* at 376.

the State to produce statements made by witnesses to police officers which had been reduced to writing in police reports.[138] The State objected on the ground that police reports are protected work product under *State ex rel. Keaton v. Circuit Court of Rush County*.[139] The court rejected the argument, and ruled that statements which purport to be the words of the witness reduced to writing as the witness spoke or shortly thereafter are discoverable even if they are contained in a police report.[140] If a police officer's opinions, impressions, and theories are interspersed with witness statements, an in-camera inspection by the trial court should be utilized to determine whether the document is essentially a witness statement or a privileged report.[141]

A trial court's failure to conduct an in-camera review required reversal in *Hulett v. State*.[142] Hulett was charged with child molesting. Prior to the alleged incident, the child had received counseling in relation to her parents' divorce. The defendant sought discovery of the counselor's file of the child. The trial court initially indicated it would conduct an in-camera review, but failed to do so. Thereafter, the trial court ruled that the file was not discoverable on the grounds that the material was privileged and irrelevant, and that its tender would be oppressive and burdensome.[143] The child testified at trial, and Hulett was convicted.

The court of appeals declined to create a general counselor-patient privilege, and found that the file was unprotected in this regard.[144] The court also found that any ruling on relevancy was speculative because only the counselor knew the contents of the file.[145] Because the file could contain evidence of prior false accusations or inconsistent statements bearing on the credibility of the testifying child, an in-camera inspection by the trial court was required.[146] Without such an inspection, the presence or absence of discoverable information could not be ascertained. Thus, failure to conduct an in-camera inspection was reversible error.

---

138. *Crawford*, 549 N.E.2d at 375.

139. *Id.* at 376. *See* State *ex rel.* Keaton v. Circuit Court of Rush County, 475 N.E.2d 1146 (Ind. 1985).

140. *Crawford*, 544 N.E.2d at 376.

141. *Id.*

142. 552 N.E.2d 47 (Ind. Ct. App. 1990).

143. *Id.* at 48.

144. *Id.* at 49.

145. *Id.*

146. *Id.* The claim that tendering the file was unduly burdensome because of the need to excise references to individuals other than the child was deemed to relate more to the relevancy inquiry than to the claim of burdensomeness. *Id.* at 50. The claim that the request was burdensome was only addressed in this context.

D. Double Jeopardy

The United States Supreme Court decided two double jeopardy cases last term. Each is surprising, important, and likely to prompt a flood of cases in refinement.

The first, *Grady v. Corbin*,[147] is arguably the year's blockbuster for the practicing criminal justice professional. Justice Brennan wrote for the majority in this 5-4 decision; thus, its longevity is in serious question. After an automobile collision, the defendant was ticketed for driving under the influence (D.U.I.) and for crossing the center line, which are crimes under New York state law. An occupant in the other car died shortly thereafter. Through tragic noncommunication, the prosecutors working on the traffic tickets were unaware of the fatality and the pendency of a homicide prosecution. The defendant pleaded guilty to D.U.I. and crossing the center line, and then sought to prohibit his prosecution for "reckless manslaughter" on double-jeopardy grounds.[148] The bill of particulars in the homicide prosecution showed that the prosecution would attempt to prove recklessness through (1) D.U.I., (2) crossing the center line, and (3) driving too fast for conditions. The Court held that the reckless manslaughter prosecution was barred unless the prosecutor first amended the bill of particulars to rely solely upon driving too fast for conditions.[149] The prosecutor cannot, in any retrial, attempt to prove conduct that is either D.U.I. or crossing the center line.[150]

This decision marks a radical departure from existing doctrine. The Supreme Court in *Blockburger v. United States*[151] held that offenses are not the "same" for double-jeopardy purposes if each requires proof of a material element that the other does not.[152] Thus, if offenses are identical or one is a lesser-included offense of the other, conviction for both is improper. Clearly, the prosecution in this case is not barred by *Blockburger* because D.U.I. and crossing the center line can be committed without a death ensuing and involuntary manslaughter can occur without the commission of these particular traffic offenses.

Likewise, if the government had lost on a factual element common to the second case, the "collateral estoppel" extension of double jeopardy

---

147. 110 S. Ct. 2084 (1990).

148. *Id.* at 2086. The New York reckless manslaughter statute is equivalent to Indiana's reckless homicide statute. IND. CODE § 35-42-1-5 (1988).

149. *Grady*, 110 S. Ct. at 2086.

150. *Id.* at 2094.

151. 284 U.S. 299 (1932).

152. *Id.* at 304.

would bar the second trial.[153] In the case at bar, however, the government *won* the earlier case.

The Court, in a striking extension of the reach of the double jeopardy clause, adopted dicta in *Illinois v. Vitale*,[154] and held as follows:

> As we suggested in *Vitale*, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the state will prove, not the evidence the State will use to prove that conduct.[155]

Note that the homicide prosecution is not based on a theory that the killing was committed during the perpetration of an unlawful act, a theory which would require the State to prove the unlawful act as an essential element of the current charge.[156] Such would be parallel to convicting the defendant first for arson and then prosecuting the defendant for felony murder based on arson, a scenario clearly barred under *Harris v. Oklahoma*.[157] The homicide theory in *Grady* was recklessness, not unlawful act; recklessness may *occasion* the proof of unlawful acts such as D.U.I., but it does not *require* it.[158] These acts of recklessness happen to be crimes themselves, but the theory of recklessness does not require proof that the underlying activity is an independent crime.[159] For these reasons, the *Grady* holding extended double jeopardy protection well beyond its previous boundaries.

The *Grady* court's holding does not quite extend double jeopardy to embrace the civil notion of compulsory joinder, but it has moved a great distance in that direction. Until this decision is given more definition, prosecutors must be vigilant not to permit any charges to go to trial or plea if any part of the conduct covered thereby will form part of the factual content of any subsequent criminal proceeding.[160]

---

153. Ashe v. Swenson, 397 U.S. 436 (1970).

154. 447 U.S. 410 (1980).

155. *Grady*, 110 S. Ct. at 2093.

156. This would be the case in Indiana if prosecution were brought under Involuntary Manslaughter, IND. CODE § 35-42-1-4 (1988), but not true under Reckless Homicide, IND. CODE § 35-42-1-5 (1988).

157. 433 U.S. 682 (1977).

158. *Grady*, 110 S. Ct. at 2094.

159. *See* IND. CODE § 35-42-1-5 (1988).

160. Prosecutors will have to be careful that proof in any trial will not foreclose an opportunity to try other charges arising out of the same conduct, whether currently charged or not. Fear of a *Grady* foreclosure of later prosecutions may amount to a *de facto* compulsory joinder regime. If the defendant successfully moves for a severance of counts, presumably this will constitute a waiver of the *Grady* protection.

The other 1989 Supreme Court double jeopardy decision was *Dowling v. United States*.[161] In *Dowling*, the defendant was tried for the first robbery (Robbery 1) and acquitted. The defendant was then tried for the second robbery (Robbery 2). At the second trial, the Government called a witness to identify the defendant as the perpetrator of Robbery 1, an identification the Court assumed would otherwise fit under the Federal Rule of Evidence 404(b) exception to character evidence.[162] The defendant conceded admissibility under Rule 404(b), but claimed that any reference to his identity in Robbery 1 was barred by double jeopardy because it would force him, in effect, to relitigate issues on which he had already prevailed.[163] The Court held 6-3 that there was no constitutional violation, and that this identification testimony was admissible.[164] Relying on a subtle distinction in the applicable burdens of proof, the Court noted that the first trial demonstrated only that the defendant was not identified as the perpetrator in Robbery 1 *beyond a reasonable doubt*.[165] The standard for Rule 404(b) evidence of other crimes, however, is only a *preponderance of the evidence* under *Huddleston v. United States*.[166] Because the Robbery 2 trial court found by a preponderance that the defendant committed Robbery 1, the prior acquittal did not bar the testimony.[167] Thus, past specific instances of misconduct that have been litigated to acquittal stand on the same footing as those that have not yet been litigated. If the prosecution can persuade the trial court by a preponderance of the evidence that such crimes occurred, they are admissible if they fit the Rule 404(b) exception to character evidence.[168]

The dissent raised an interesting question: If the standard of proof for sentencing purposes of past misconduct including crimes is less than beyond a reasonable doubt as it typically is, could a prior acquittal be used to enhance a sentence?[169] There are Indiana cases to the contrary,[170] but they are prior to *Dowling*.[171]

---

161. 110 S. Ct. 668 (1990).

162. Indiana courts recognize the 404(b) exception to character evidence. *See* 12 R. MILLER, INDIANA EVIDENCE 265-94 (1984), which describes the admissibility of prior acts to prove intent, motive, knowledge, malice, sanity, scheme or plan, capacity to commit offense, identity, and depraved sexual instinct.

163. *Dowling*, 110 S. Ct. at 672.

164. *Id.* at 675.

165. *Id.* at 672-73.

166. 485 U.S. 681 (1988).

167. *Dowling*, 110 S. Ct. at 673.

168. *Id.*

169. *Id.* at 680 (Brennen, J., dissenting).

170. *See, e.g.*, McNew v. State, 271 Ind. 214, 391 N.E.2d 607 (1979).

171. *See infra* § III(H).

In *Tyson v. State*,[172] the Fourth District Court of Appeals confronted a vexing manifest-necessity scenario.[173] The defendant's trial for burglary and theft had commenced (hence, jeopardy had attached), and unexpectedly a critical prosecution witness who was under subpoena vanished. The prosecution moved for a mistrial, which the court granted over the defendant's objection. The defendant was convicted at a subsequent trial after having properly preserved his double jeopardy challenge.[174]

The question presented was whether the absence of the witness was "manifest necessity" so as to permit a second trial after a mistrial of the first.[175] The majority held that it was not manifest necessity because once having subjected defendant to jeopardy, the state was bound to see the case to conclusion even if its witnesses became unavailable.[176] The dissent, while recognizing that the majority's position would be true as a general rule, noted that the combination of the following factors should have led to a different result in this case: (1) the witness had been served with subpoena; (2) the witness drove the getaway car; (3) the witness was the only one who saw the defendant at scene; (4) the witness had an ongoing friendship with the defendant; and (5) this friendship appeared to be the reason for her absconding.[177] Thus, the dissent argued, applying the double jeopardy bar in this case placed an unfair burden on the State.[178]

This issue is a difficult one. It seems harsh to charge either the prosecution or the defendant with the witness's absconding in the absence of proof of connivance. Presumably, if the State could show that the defendant participated in the disappearance, no constitutional violation could be shown.[179] Nor will it ordinarily be clear that a mistrial will help the prosecution; after all, if the witness runs away out of friendship for the defendant, why should one assume that, once discovered, her testimony will be what the State hopes?[180] In the first trial, the prosecution

---

172. 543 N.E.2d 415 (Ind. Ct. App. 1989).

173. "Manifest necessity" is a doctrine permitting retrial after a mistrial caused through no egregious fault of the prosecution. *See* IND. CODE § 35-41-4-3 (1988).

174. The appellate record does not indicate whether this critical witness testified at the second trial, a rather astounding omission.

175. The manifest necessity exception to double jeopardy is codified in IND. CODE § 35-41-4-3 (1988).

176. *Tyson*, 543 N.E.2d at 419-20.

177. *Id.* at 420 (Chezum, J., dissenting).

178. *Id.*

179. *Id.*

180. Of course, in this case, the appellate court addressed the question *after* the second trial, though the record does not tell the reader whether the absent witness testified and, if so, how. Ordinarily, however, double-jeopardy challenges *precede* the second trial because being forced to undergo the second trial is part of what the clause protects against.

had called other witnesses and presumably could have let the case proceed to jury determination. The majority's fear was that prosecutors will begin to use "manifest necessity" when their evidence is not evolving as strongly as it might in a later trial.[181] If the missing witness cannot be shown to be critically important, this fear becomes more realistic.

E. Confrontation

The United States Supreme Court decided two confrontation cases last term, each arising from the tension between the defendant's sixth amendment confrontation interests, the cross-examination interest and the face-to-face interest, and the state's need for the testimony of minor children in sexual abuse cases. The Court rejected an attempt to introduce a child's hearsay statement through a relator, thus maintaining the strength of the cross-examination interest,[182] but permitted cross-examined testimony of a child witness separated from the courtroom, thus weakening the face-to-face interest.[183]

In *Idaho v. Wright*,[184] the trial court permitted a physician to relate the statements of a two-and-a-half-year-old child. It had been determined that the child could not possibly give meaningful testimony at trial.[185] Though conceding that the testimony included hearsay, the trial court found that the child's statement bore sufficient indicia of reliability to fit the Idaho "residual" or "catch-all" exception, the functional equivalent of Federal Rule of Evidence 803 (24),[186] and therefore rejected the defendant's confrontation claim.

The Supreme Court began by assuming that the child was unavailable, thus paving the way for a hearsay admission, but held that under the confrontation clause, indicia of reliability were insufficient to admit the evidence.[187] Indeed, as the Court noted, there are many reasons to be

---

181. *Tyson*, 543 N.E.2d at 419.
182. Idaho v. Wright, 110 S. Ct. 3139 (1990).
183. Maryland v. Craig, 110 S. Ct. 3157 (1990).
184. 110 S. Ct. 3139 (1990).
185. *Id.* at 3141.
186. The drafters of the Federal Rules of Evidence noted that the historical development of hearsay exceptions was often frustrated by cases in which everyone appreciated the high trustworthiness of given hearsay, but could not fit it within an existing "pigeonhole." Often, to admit the evidence, courts would expand the most appropriate pigeonhole. Over time, this had the effect of creating exceptions that would accommodate hearsay that was not at all trustworthy. "Hard cases make bad law." To avoid a repeat of this process, the drafters inserted a "residual" exception to hearsay. *See* FED. R. EVID. 803(24) and 804(b)(5). Under these rubrics, the court can admit highly trustworthy hearsay without destroying the integrity of the other historical exceptions.
187. *Wright*, 110 S. Ct. at 3152.

particularly suspicious of these statements in sexual abuse cases.[188] Thus, the Court affirmed the state supreme court's reversal of the conviction.[189] The opinion reaffirmed that if a statement fits a "firmly rooted" exception to the hearsay rule, it will pass muster under the confrontation clause.[190] However, cases under the "residual" exception must be monitored on a case-by-case basis for sufficient indicia of reliability to meet a confrontation challenge.[191]

Maryland v. Craig[192] began the refinement of the face-to-face protection of *Coy v. Iowa*.[193] If the trial court determines, in an individual case, that testimony in the courtroom will cause a child witness to suffer serious emotional distress such that the child cannot reasonably communicate, the trial court may arrange a closed-circuit process that separates the child from the courtroom.[194] *Craig* suggests that the method used in this case is permissible, though other methods may also be permissible.[195] Here the witness, prosecutor, and defense counsel were in a separate room, all viewable by judge, jury, and defendant, and the defendant was in direct audio contact with his attorney. The child could not see the defendant or others in the courtroom. The Supreme Court pointed out that there had been a particularized holding by the trial court that the child's view of the defendant would have caused trauma. If, however, a trial court should find that the problem is not the presence of the defendant, but rather the general courtroom setting, the defendant should join the others in the separate room to give the fullest protection to the defendant's face-to-face interest.[196]

The Indiana Court of Appeals for the First District had occasion to review the "face-to-face" aspect of confrontation in *Casada v. State*.[197] Defendant, the step-father of the alleged victim, E.T., was convicted of two counts of attempted child molesting, a class C felony.[198] At the trial, thirteen-year-old E.T.[199] became so distraught on the stand that she could not respond to the first question asked on direct examination by the prosecution. After a short recess, the trial court ordered a six-foot by four-foot chalkboard to be placed between the witness and the

---

188. *Id.* at 3151.
189. *Id.* at 3153.
190. *See* United States v. Inadi, 475 U.S. 387 (1986).
191. *Wright*, 110 S. Ct. at 3152.
192. 110 S. Ct. 3157 (1990).
193. 487 U.S. 1012 (1988).
194. *Craig*, 110 S. Ct. at 3170.
195. *Id.* at 3167-68.
196. *Id.* at 3169.
197. 544 N.E.2d 189 (Ind. Ct. App. 1989).
198. IND. CODE § 35-42-4-3(c) (1988).
199. She was 12 years old at the time of the alleged incident.

defendant in an attempt to decrease the witness's anxiety. She was then able to give testimony; indeed, the chalkboard was removed during cross and redirect examination.

In a carefully reasoned opinion, Judge Ratliff first reviewed the history of the confrontation clauses of the United States and Indiana constitutions with particular attention to the recently re-emerging emphasis on face-to-face viewing.[200] The opinion notes that for witnesses under ten years of age, the legislature has provided some guidance in this area.[201] These provisions did not apply to the case at bar due to the witness's age. In any event, the statutes were not intended as the exclusive word on the subject, and a trial court is free to fashion other remedies to balance the government's legitimate interests (including the development of testimony) against the defendant's interests in a face-to-face encounter.[202] The core of the holding is that a witness's mere nervousness or temporary inability to testify is not, without further inquiry, sufficient to overcome the defendant's strong constitutional interests.[203] A chalkboard or other suitable barrier can, in an appropriate case, be a permissible technique; however, the trial court in this case had examined no witnesses to determine if the witness would or would not be able to reasonably communicate without such apparatus. Either further inquiry or less drastic means, such as a recess to permit the witness to collect composure, should have preceded the use of the barrier.[204]

F. Scientific Evidence

Although this Article does not embrace the discipline of "evidence," no criminal law survey could be complete without noting that Indiana has joined the growing list of states that have, by statute, accepted forensic DNA[205] analysis as sufficiently scientific for use in court.[206]

G. Trial

1. Jury Selection.—During his state court trial, a white defendant objected to the prosecutor's use of two peremptory challenges to strike

---

200. *Casada*, 544 N.E.2d at 189. *See also* Coy v. Iowa, 108 S. Ct. 2798 (1988) (the leading case on the sixth-amendment application); Miller v. State, 531 N.E.2d 466 (1988) (the leading case on article I, section 13 of the Indiana Constitution).

201. IND. CODE §§ 35-37-4-6 and 35-37-4-8 (1988 & Supp. 1990).

202. *Casada*, 544 N.E.2d at 196.

203. *Id.*

204. *Id.*

205. Deoxyribonucleic Acid.

206. IND. CODE § 35-37-4-10 (Supp. 1990).

the only two blacks on the venire panel from the petit jury. In *Holland v. Illinois*,[207] Holland, the defendant, preserved both the sixth amendment fair cross-section claim and the equal protection claim in the Illinois state courts. Unfortunately, Holland pursued only the fair cross-section claim before the United States Supreme Court.

Because every defendant has a sixth amendment right to a venire designed to provide a fair cross-section of the community, the Court concluded that Holland had standing to raise the sixth amendment claim even though he was not a member of a systematically excluded group.[208] Nevertheless, the Court rejected the claim on the merits. The Court adhered to its ruling in *Lockhard v. McCree*[209] that the fair cross-section requirement applies only to the venire panel and not to the petit jury.[210] The fair cross-section requirement was viewed as a means of assuring an impartial jury, not a representative jury.[211] To this end, the fair cross-section requires that the venire stage can be disrupted at the petit jury stage to serve the State's legitimate interest in obtaining an impartial jury.[212] The State, therefore, may use peremptory challenges to eliminate jurors belonging to groups it believes would unduly favor the other side.

The fair cross-section requirement of the sixth amendment is not offended by such conduct even if the strikes are based on racial groupings because (1) the fair cross-section requirement applies to the venire panel and not to petit juries and (2) disrupting the cross-section provided by the venire is often necessary to secure an impartial jury.[213] Indeed, the Court indicated that the sixth amendment right to an impartial jury would be impaired, if not lost, by any rule requiring that the petit jury reflect a fair cross-section of the community.[214] *Holland v. Illinois* explicitly holds that although use of peremptory challenges based on race may violate the equal protection clause, it does not violate the sixth amendment's fair cross-section requirement.[215]

The more interesting aspect of *Holland* is Justice Kennedy's concurring opinion in the 5-4 decision. Justice Kennedy noted that the decision does not alter the rule that exclusion of jurors, based on race, violates the equal protection clause.[216] Justice Kennedy also stated that

---

207. 110 S. Ct. 803 (1990).

208. *Id.* at 805.

209. 476 U.S. 162 (1986).

210. *Holland*, 110 S. Ct. at 806 (citing Lockhard v. McCree, 476 U.S. 162, 174 (1986)).

211. *Id.* at 807.

212. *Id.* at 809.

213. *Id.* at 808.

214. *Id.*

215. *Id.* at 806.

216. *Id.* at 811 (Kennedy, J., concurring) (citing Batson v. Kentucky, 476 U.S. 79 (1986)).

a white defendant would have standing to raise the claim.[217] Coupled with the four dissenters, Justice Kennedy would have been the fifth vote to find the equal protection claim available to any defendant. Thus, Holland would have been deemed to have standing on the equal protection claim had he pursued it. However, because one of the dissenters, Justice Brennan, has retired, the ultimate resolution of this particular standing question remains unclear.

The language in *Holland* regarding standing on the equal protection claim raises questions regarding the viability of the Indiana case law dealing with *Batson* issues. *Batson* issues also were addressed most recently by the Indiana Supreme Court in *Minniefield v. State*.[218] In *Minniefield*, two black defendants were tried on robbery charges. The State's evidence included a slip of paper taken from the victim's pocket which was recovered during a search of one of the defendants. Racist jokes were written on the paper. It appeared that the source of the racist jokes was the victim. As a matter of strategy, the State used six peremptory challenges to strike one white and five black prospective jurors, leaving a petit jury of one black and eleven white persons. The defense objected based on *Batson v. Kentucky*.[219]

On appeal to the Indiana Supreme Court, the convictions were reversed.[220] The court ruled that to establish a denial of equal protection, a defendant must show the following: (1) He is a member of a cognizable racial group; (2) the prosecutor peremptorily challenged members of the defendant's race; and (3) the circumstances raise an inference that the prosecutor excluded veniremen because of their race.[221] Once a defendant demonstrates as much, the State must provide a neutral explanation.[222]

In *Minniefield*, the defendants clearly offered circumstances that raised the inference that the prosecution excluded jurors based on race. The Indiana Supreme Court rejected strategic grounds as a neutral explanation.[223] Likewise, the court rejected the State's claim that the challenges were not based on the jurors' "racial" identity with the defendant.[224] The majority found that the use of peremptory challenges based on race is a per se violation of the equal protection clause.[225]

---

217. *Id.* at 811-12 (Kennedy, J., concurring).

218. 539 N.E.2d 464 (Ind. 1989). *Minniefield* was discussed in last year's survey article. *See* Kammen & Polito, *Criminal Law and Procedure, Survey of Recent Developments in Indiana Law*, 22 IND. L. REV. 303 (1990).

219. 476 U.S. 79 (1986).

220. *Minniefield*, 539 N.E.2d at 467.

221. *Id.* at 466.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

The viability of the *Minniefield* requirement that the challenged jurors be members of the defendant's race is questionable. Again, the *Holland* opinion demonstrated the existence of five votes that would hold that all defendants have standing to challenge the exclusion of jurors based on race on equal protection grounds.[226] Four members of the majority in *Holland* did not express their views on the issue. At worst, Justice Brennan's retirement means the vote would be 4-4 leaving the Court's newest member, Justice Souter, in the tie-breaker position. Accordingly, all defendants should preserve the *Batson* issue if it arises during jury selection, notwithstanding the *Minniefield* requirement that the defendant and the challenged jurors be members of the same racial group.

2. Waiver.—According to the Indiana Court of Appeals decision in *Phillips v. State*,[227] forfeiture of the right to be present for trial requires sufficient evidence to support a finding that the waiver was knowing and intelligent.[228] Phillips, a Missouri attorney, proceeded pro se. The record was unclear about whether Phillips had received notice of pretrial and trial dates. When Phillips called the prosecutor to ascertain the trial date, he was advised that the trial had occurred a few days earlier. Not surprisingly, Phillips had lost.

On appeal, the court held that the right to be present at trial is fundamental to a fair trial.[229] As a consequence, waiver of the right would be controlled by the standard of *Johnson v. Zerbst*.[230] A finding of waiver must be supported by evidence sufficient to show an intentional relinquishment of a known right.[231] A statement by the court reporter that notice of the trial date would have been mailed to the defendant is insufficient to support such a finding.[232] Evidence sufficient to meet the standard should demonstrate that the defendant knew of the trial date and, by his absence, intended to avoid trial.[233]

3. Instructions.—In the Indiana Supreme Court decision of *Madden v. State*,[234] the trial court had instructed the jury that "[i]t is not essential in this cause that the testimony of the prosecuting witness be corroborated by other evidence. It is sufficient if, from all the evidence, you believe beyond a reasonable doubt that the crimes were committed by the Defendant as alleged."[235] Madden, the defendant, objected on the ground

---

226. *Holland*, 110 S. Ct. at 813 (Marshall, J., dissenting).
227. 543 N.E.2d 646 (Ind. Ct. App. 1989).
228. *Id.* at 648.
229. *Id.*
230. 304 U.S. 458 (1938).
231. *Phillips*, 543 N.E.2d at 648.
232. *Id.*
233. *Id.* at 649.
234. 549 N.E.2d 1030 (Ind. 1990).
235. *Id.* at 1033.

that the instruction over-emphasized the victim's testimony. On appeal, the majority recognized that when more than one witness testifies, it is improper for a trial court to comment on or emphasize a particular witness's testimony.[236] Nevertheless, the majority concluded that because only the victim had testified regarding identification of the accused and the acts he had perpetrated on her,[237] and because her testimony need not be corroborated, the instruction was appropriate.[238]

In his dissent, Justice DeBruler provided a powerful condemnation of the instruction. The rule suggesting that a conviction may rest on the uncorroborated testimony of the victim is an appellate standard of review, not a standard to be applied by the trier of fact.[239] Justice DeBruler also noted that lack of corroboration is a legitimate element for the trier of fact to consider in determining the credibility of witnesses and the weight to be accorded to such testimony.[240] The instruction, however, strongly suggested that the jury should not consider the lack of corroboration as it affects the witness's credibility or the weight of the testimony. Last, a general instruction on credibility and weight, applicable to all testimony, could include an explanation regarding corroboration to provide a balanced and fair instruction. Given all this, Justice DeBruler would have found that the challenged instruction was improper because it called special and specific attention to an individual witness, namely the State's key witness.[241]

In another jury instruction case, *Pinegar v. State*,[242] the Indiana Court of Appeals found that the defenses of heat of passion and self-defense are not inherently inconsistent.[243] If there is evidence to support each defense, both should be submitted to the jury. *Pinegar* was a homicide case in which the evidence demonstrated that the victim sought the confrontation and struck the first blow. The trial court instructed on self-defense, but refused to instruct on voluntary manslaughter, that is, murder mitigated by sudden heat. The court of appeals rejected the State's assertion that dicta in *Ward v. State*[244] compelled the conclusion

---

236. *Id.*

237. The significance of this statement is unclear. That an individual witness is the only witness on a particular point is the norm in multiwitness trials. Trials in which all witnesses testify on all issues are atypical. Focusing special attention on the testimony of a single witness has been previously condemned, as Justice DeBruler observed in Hackett v. State, 266 Ind. 103, 360 N.E.2d 1000 (1977).

238. *Madden*, 549 N.E.2d at 1033.

239. *Id.* at 1035 (DeBrueler, J., dissenting).

240. *Id.*

241. *Id.* at 1036.

242. 553 N.E.2d 525 (Ind. Ct. App. 1990).

243. *Id.* at 528.

244. 519 N.E.2d 561 (Ind. 1988).

that killing in sudden heat was inherently inconsistent with self-defense.[245] The Indiana Supreme Court stated that the particular facts of *Ward* presented a self-defense, not a sudden heat, question.[246] The Court of Appeals found the language restricted to the facts of *Ward*.[247] Both defenses can admit the existence of the crime of murder, which is the knowing or intentional killing of another human being.[248] Self-defense offers a complete defense, that is, the knowing and intentional killing was justified because the use of deadly force was necessary to prevent serious bodily injury to oneself or others.[249] Heat of passion offers a partial defense; that is, the knowing or intentional killing occurred while acting under the sudden heat of passion.[250]

When the accused is actually provoked and responds, self-defense and sudden heat both may be appropriate. The jury, not the court, should determine whether the force utilized was reasonable (self-defense), or whether the force was excessive, but utilized in the sudden heat generated by the initial attack (voluntary manslaughter).[251] Thus, if the facts warrant, the trial court should charge the jury on both defenses.

H. Guilty Pleas

The Indiana Supreme Court retreated from yet another aspect of previously fixed rules pertaining to guilty pleas, as originally set forth in *German v. State*.[252] In *German*, the court held that a trial judge must personally inform the defendant of all the rights, among other things, forfeited by a guilty plea.[253] Failure to do so would require reversal.[254] In *White v. State*,[255] the Indiana Supreme Court limited the *German* rule, and held that only the trial court's failure to inform the defendant of the right to a jury trial, the right of confrontation, or the right against self-incrimination requires automatic reversal.[256] Other omissions must be coupled with a showing that the omission actually rendered the plea involuntary or unintelligent.[257]

---

245. *Pinegar*, 533 N.E.2d at 528.
246. *Ward*, 519 N.E.2d at 563.
247. *Id.*
248. IND. CODE § 35-42-1-1 (1988 & Supp. 1990).
249. *Id.* § 35-41-3-2 (1988).
250. *Id.* § 35-42-1-3.
251. *Pinegar*, 533 N.E.2d at 528.
252. 428 N.E.2d 234 (Ind. 1981).
253. *Id.* at 236.
254. *Id.* at 237.
255. 497 N.E.2d 893 (Ind. 1986).
256. *Id.* at 905-06.
257. *Id.* at 901.

In *Youngblood v. State*,[258] the supreme court, without reference to *German*, ruled that a guilty plea record devoid of any personal advisement by the trial court may be rehabilitated by the later presentation of evidence.[259] The court rejected the existence of any right to an advisement by the trial court.[260] The defense counsel's postconviction testimony that the defendant was advised of his rights by counsel was sufficient to establish that the original plea was voluntary and intelligent.[261]

Justice DeBruler dissented, and equated the personal advisement rule with *Miranda* rights.[262] The purpose of the rule is to safeguard the underlying rights.[263] By requiring a colloquy between the trial judge and the defendant, the record would reflect not only the defendant's knowledge of the rights but also a manifestation of a freely made decision to forego those rights.[264] Rehabilitation of the record by postconviction testimony may demonstrate the defendant's knowledge of his rights, but it may not provide any manifestation of a decision to forego the rights freely made by the defendant.[265] In *Youngblood*, no manifestation of waiver was presented. Nevertheless, the majority found the plea to be valid.[266]

Prosecutorial "persuasion" in the form of an offer to forego filing a habitual offender count in exchange for an immediate, uncounseled guilty plea was addressed by the Indiana Court of Appeals in *Hood v. State*.[267] Hood was arrested on April 25, 1986 and incarcerated. Prior to his initial hearing, a prosecutor approached Hood and offered to forego filing a habitual offender count if Hood immediately pleaded guilty, without counsel, to the charged offenses of theft and forgery. Hood pleaded guilty, and thereafter sought post-conviction relief.

On appeal, the court acknowledged that a defendant can be threatened with the filing of an habitual count to induce a plea.[268] Thus, the prosecutor in *Hood* could make use of such a threat. However, the prosecutor's insistence on an uncounseled plea was not permissible.[269]

---

258. 542 N.E.2d 188 (Ind. 1989).
259. *Id.* at 189.
260. *Id.*
261. *Id.*
262. *Id.* at 190 (DeBruler, J., dissenting).
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.* at 189.
267. 546 N.E.2d 847 (Ind. Ct. App. 1989).
268. *Id.* at 849. Courts see little difference between an offer to forego filing the habitual count to induce a plea and the practice of filing the habitual count and subsequently offering to dismiss it in exchange for a plea. *See generally* Bordenkircher v. Hayes, 434 U.S. 357 (1978); Jackson v. State, 499 N.E.2d 215 (Ind. 1986).
269. *Hood*, 546 N.E.2d at 849.

The court suggested that plea bargaining is premised on the notion that a defendant, advised by counsel and protected by procedural safeguards, is capable of making intelligent choices.[270] "Conversely, uncounseled defendants are considered incapable of intelligent choices . . . ."[271] Uncounseled defendants generally are not informed of matters involving likelihood of conviction, probable punishment, and the legal consequences of their conduct.

In addition to stating its view on the value of counsel in plea bargaining, the court referred to federal cases holding that counsel or a valid waiver of counsel is a prerequisite to permissible plea bargaining. Thus, the court appeared to be ready to decide that prosecutorial plea bargaining with an uncounseled defendant vitiates the voluntariness of any resulting plea; however, the court did not decide that issue. The court found that the facts in *Hood* were more egregious than that of a defendant who simply negotiated without counsel because the prosecutor in *Hood* insisted that the defendant waive the right to counsel.[272] The court concluded that the State's act of conditioning its offer on the defendant's agreement to forego counsel rendered the plea per se involuntary.[273] Voluntariness was not restored by the defendant's waiver of counsel at the guilty plea hearing because that waiver was tainted by the State's prior action.[274]

I. Sentencing

The Indiana courts of appeal decided three significant cases dealing with the use of "aggravating circumstances" at sentencing. The Indiana Supreme Court holding in *Willoughby v. State*[275] authorizes a trial court to consider uncharged criminal conduct as an aggravating circumstance for purposes of sentencing.[276] Willoughby was convicted of murder, robbery, and confinement. During the police investigation on those charges, Willoughby admitted that he disposed of a body in 1975 and that he did not report the event to authorities. This prior conduct was unrelated to the charges actually brought against him. At the time of sentencing, the trial court found that the prior unrelated conduct was an aggravating circumstance.[277] Willoughby's sentence was enhanced for this and other reasons.

---

270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.* at 850.
275. 552 N.E.2d 462 (Ind. 1990).
276. *Id.* at 470.
277. *Id.* at 471.

On appeal, the Indiana Supreme Court concluded that the prior unrelated conduct properly could be considered as evidence that Willoughby was a criminal accessory after the fact.[278] The fact that the conduct had not resulted in a conviction or even in the filing of a charge did not preclude its use at sentencing. The court relied on *Starks v. State*[279] to support its holding.[280] *Starks*, however, involved pending charges. Arguably, as the concurring and dissenting opinion suggested, pending charges should be considered, not as evidence of criminal conduct, but as evidence that the prior exercise of police authority over the defendant has had no deterrent effect.[281]

Use of either prior arrest records or uncharged conduct as evidence of prior criminal activity is problematic. The problem arises because the evidentiary rules applicable to trial do not apply to sentencing proceedings.[282] Thus, for example, hearsay is admissible. Few courts have developed any guidelines to ensure that the evidence of uncharged criminal conduct is reliable. Indiana courts have not done so, nor has Indiana addressed the scope of a defendant's right to challenge such assertions. A defendant confronted with such evidence should be entitled to adequate notice and a hearing to challenge the State's evidence and offer a response.[283] Thus, defendants confronted with such allegations should make a record on the issue.

In *Conwell v. State*,[284] the court of appeals found that when a defendant pleads guilty to a lesser-included offense, the trial court may not use the element that distinguishes the lesser from the greater offense as an aggravating factor.[285] Conwell was charged with burglary. The charge was classified as a B felony because the building involved was a dwelling. He pleaded guilty to burglary as a C felony pursuant to a plea agreement. At sentencing, the trial court found that the defendant's lack of any criminal history was a mitigating circumstance. The court also found an aggravating circumstance — the burglarized building was

---

278. *Id.* at 470.
279. 489 N.E.2d 43 (Ind. 1986).
280. *Willoughby*, 552 N.E.2d at 470.
281. *Id.* at 471 (DeBruler, J., concurring and dissenting).
282. *See* Williams v. New York, 337 U.S. 241 (1949).
283. It is reasonable to assume that the procedural protections which attach to a sentencing hearing would at least be equal to those available in parole revocation hearings. *See* Morrissey v. Brewster, 408 U.S. 471 (1972) (right to notice, disclosure of the State's evidence, opportunity to be heard and to present witnesses, cross-examine, and confrontation unless good cause is shown). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (in prison disciplinary hearing, defendant has right to adequate notice and to call witnesses to respond to the allegations).
284. 542 N.E.2d 1024 (Ind. Ct. App. 1989).
285. *Id.* at 1025.

a dwelling. Conwell was sentenced to eight years, a presumptive term of five years with three years added for aggravating circumstances.

The court of appeals analogized Conwell's situation to the facts of *Hammons v. State*.[286] In *Hammons*, the Indiana Supreme Court found that a trial court may not impose the maximum sentence on the lesser offense to compensate for the perceived error made by a jury in acquitting the defendant on the greater charge.[287] The court of appeals found no distinction between a jury verdict and a plea of guilty.[288] In either case, the element that distinguishes the greater from the lesser offense may not be used to enhance the defendant's sentence.[289]

The last noteworthy case decided in Indiana pertaining to aggravating circumstances is *Lane v. State*.[290] In *Lane*, a trial court utilized as an aggravating factor the fact that the defendant, as a juvenile, had been adjudicated as a CHINS (Children In Need of Services). Noting that juveniles adjudged to be CHINS are victims of their circumstances, not juvenile criminals, the court of appeals reversed.[291] Although a juvenile history of criminal acts can serve as an aggravating circumstance,[292] one's status as a CHINS may not so serve.

The next noteworthy sentencing case is the Indiana Supreme Court's decision in *Seay v. State*.[293] From July 14, 1986 to September 2, 1986, the defendant sold controlled substances on four occasions to an undercover policeman and an informant. In February 1987, the defendant was tried on the two counts that arose from the first two sales. He was convicted, found to be an habitual offender, and sentenced to sixty years. While the jury was deliberating in that case, the State filed two new counts based on the last two sales, and again sought the habitual offender enhancement. Seay was tried on the new charges, found guilty, and sentenced to sixty years — fifteen years on each count, consecutive to one another — with one count enhanced by thirty years for the habitual finding. This sentence was imposed consecutive to the first sentence of sixty years.

Seay challenged the second trial on various grounds. On appeal, the supreme court rejected the claim that the State was required to join the

---

286. 493 N.E.2d 1250 (Ind. 1986).
287. *Id.* at 1253.
288. *Conwell*, 542 N.E.2d at 1025.
289. *Id.*
290. 551 N.E.2d 897 (Ind. Ct. App. 1990).
291. *Id.* at 899.
292. *See* Jordan v. State, 512 N.E.2d 407 (Ind.), *reh. denied*, 516 N.E.2d 1054 (Ind. 1987).
293. 550 N.E.2d 1284 (Ind. 1990).

four charges in one prosecution, as well as the claim that collateral estoppel barred the second prosecution.[294] However, relying on *Starks v. State*,[295] the court found that the State is barred from seeking multiple habitual offender enhancements by bringing successive prosecutions for charges that could have been consolidated for trial.[296] Thus, whether the State seeks two habitual offender enhancements in one trial or separates the charges by initially withholding the filing of all available charges, the State may not secure consecutive habitual offender enhancements.[297]

Last, pertaining to sentencing, the legislature provided two significant developments. First, the presumptive sentence for a class C felony was reduced from five to four years; four years, instead of three, may now be added for aggravating circumstances; and two years, instead of three, subtracted for mitigating circumstances.[298] In short, the sentencing range for a class C felony remains two to eight years, only the presumptive sentence is changed. The presumptive sentence for a class D felony was reduced from two years to a year and a half.[299] A year and a half, instead of two, may be added for aggravating circumstances.[300] There

---

294. *Id.* at 1288. Indiana's statutory bars to subsequent prosecutions are set forth in IND. CODE § 35-34-1-10(c) (1988) and IND. CODE § 35-41-4-4 (1988). Both speak in terms of bars to prosecutions for offenses that "could have been joined" or "should have been charged." Nevertheless, case law interpretations have preserved to the State the right not to pursue all charges in a unified action. *See* Webb v. State, 453 N.E.2d 180 (Ind. 1983), *cert. denied*, 465 U.S. 1081 (1984). Thus, without fear of any subsequent bar, the State may separate offenses by not filing some of the charges, even if all the offenses were committed at the same time or during the same criminal episode. *But see* Grady v. Corbin, 110 S. Ct. 2084 (1990) (double jeopardy discussion regarding offenses involving the same conduct).

295. 523 N.E.2d 735 (Ind. 1988) (trial courts lack the power to require that habitual offender sentences run consecutively when meting out several sentences).

296. *Seay*, 550 N.E.2d at 1288. It is interesting to note that the court, for purposes of determining if a bar to subsequent prosecution existed, found the mandatory joinder requirement of Indiana Code § 35-34-1-10(b) applicable only to charges actually filed. IND. CODE § 35-34-1-10(b) (1988) (mandatory duty to join related charges arising to common scheme or plan). Yet, the court found that the second set of charges against Seay, which were not filed until after the first trial, could have been joined with the initial charges for purposes of determining that pyramiding habitual offender sentences could not be sought. *Seay*, 550 N.E.2d at 1288. It appears that the State retains the ability to withhold charges and force separate trials, but loses part of the incentive to do so.

297. Oddly, in *Starks*, 523 N.E.2d at 737, the remand order directed the trial court to order the two habitual offender enhanced sentences to run concurrently, but in *Seay*, the remand order directed the trial court to vacate the habitual offender sentence enhancement. *Seay*, 550 N.E.2d at 1289.

298. IND. CODE § 35-50-2-6 (1988 & Supp. 1990).

299. *Id.* § 35-50-2-7.

300. *Id.*

was no change in the possible one-year reduction for mitigating circumstances. The range for a class D felony is now one-half year to three years instead of one to four years.

The second legislative development was the approval of the "Boot Camp For Youthful Offenders."[301] This statute is intended to allow the Department of Corrections to create a facility for youthful offenders that provides a paramilitary environment emphasizing discipline, physical development, treatment intervention, and value modification.[302] The program is limited to youthful offenders between the ages of eighteen and twenty-five years, with no prior convictions who are serving a sentence of less than eight years.[303] If the boot camp is successfully completed, the offender is returned to the sentencing court for further disposition.[304] The concept has not been implemented yet for want of funding.[305]

J. Post-conviction

The United States Supreme Court continued its practice of gutting a defendant's right to a meaningful federal review of state court convictions.[306] In *Butler v. McKellar*,[307] the Court "fine tuned" the rule that in both capital and noncapital cases, "new rules will not be *applied or announced* in cases on collateral review unless they fall into one of two exceptions."[308] The exceptions are as follows: (1) The new rule places the conduct beyond the power of the criminal law-making authority to proscribe; and (2) the new rule is implicit in the concept of ordered liberty.[309]

---

301. *Id.* §§ 11-14-1-1 to -4-4 (Supp. 1990).

302. *Id.* § 11-14-2-5.

303. *Id.* § 11-14-1-5.

304. *Id.* § 11-14-4-4.

305. Conversation with Hon. Raymond D. Kickbush, Judge, Porter Circuit Court (March 12, 1991) (Judge Kickbush was the principal proponent of the boot-camp concept.).

306. *See generally* Wainwright v. Sykes, 433 U.S. 72 (1977), *overruling* Fay v. Noia, 372 U.S. 391 (1963) (a state procedural default bars habeas relief only if the petitioner deliberately bypassed the state courts, and the petitioner must show cause and prejudice to excuse a state court procedural default); Stone v. Powell, 428 U.S. 465 (1976) (eliminating fourth-amendment claims by state prisoners from habeas review); Teague v. Lane, 109 S. Ct. 1060 (1989) (no new constitutional rules of criminal procedure will be announced on habeas review unless those rules will be applied retroactively to all defendants similarly situated).

307. 110 S. Ct. 1212 (1990).

308. *Id.* at 1216 (emphasis added) (quoting Penry v. Lynaugh, 109 S. Ct. 2934, 2944 (1989) (citation omitted)).

309. Teague v. Lane, 109 S. Ct. 1060, 1063-64 (1990). The likelihood that the current United States Supreme Court would find a "new rule" that meets either exception is similar to the likelihood that a resurrected Casanova would find something new about sex.

In *Butler*, the Supreme Court addressed the question of whether a rule is new or dictated by existing precedent. The petitioner in *Butler* had been arrested on an assault and battery charge. He invoked his constitutional right to counsel and retained a lawyer. Thereafter, the police informed him that he was a suspect in an unrelated murder case. Butler was again given *Miranda* warnings; he waived his rights and made a statement. The statement was utilized, over Butler's objection, in the state court homicide trial in which he was convicted.

Butler sought federal habeas relief on the ground that the police should not have initiated questioning on the unrelated murder knowing that he had invoked his right to counsel on the assault and battery case. Butler argued that *Edwards v. Arizona*[310] required the police to refrain from initiating any questioning once the accused invokes his right to counsel on any offense.[311] Butler relied on *United States ex rel Espinoza v. Fairman*[312] which interpreted *Edwards* to support Butler's claim.[313] The Court of Appeals for the Fourth Circuit rejected his argument, finding that *Edwards* did not preclude questioning on an entirely different charge.[314] The Fourth Circuit found that the contrary holding at the Seventh Circuit's decision in *Espinoza* was an unpersuasive and dramatic extension of *Edwards*.[315]

On the same day that the Fourth Circuit denied rehearing, the Supreme Court decided *Arizona v. Roberson*.[316] The Court in *Roberson* held that the fifth amendment bars police-initiated interrogation following an accused's request for counsel in a separate investigation.[317]

Butler sought, and the Supreme Court granted, certiorari.[318] The Supreme Court found that Butler could not rely on *Roberson* because *Roberson* announced a new rule.[319] Butler pointed out that the majority in *Roberson* had said the case was directly controlled by *Edwards* and that, in *Roberson*, Arizona had specifically asked the Court to create an exception to *Edwards*.[320] Notwithstanding, the majority in *Butler* found that a new rule is announced even if a prior decision controls the result, but that result is "susceptible to debate among reasonable minds."[321]

---

310. 451 U.S. 477 (1981).
311. *Butler*, 110 S. Ct. at 1214.
312. 813 F.2d 117 (7th Cir. 1987).
313. *Butler*, 110 S. Ct. at 1215.
314. Butler v. Aiken, 846 F.2d 255 (4th Cir. 1988).
315. *Id.* at 258.
316. 486 U.S. 675 (1988).
317. *Id.* at 687-88.
318. 109 S. Ct. 1952 (1989).
319. *Butler*, 110 S. Ct. at 1218.
320. *Id.*
321. *Id.* at 1217.

As the dissent noted, *Butler* apparently held that a ruling sought by a habeas petitioner will be deemed "new" unless the challenged procedure "was so clearly invalid under the then prevailing legal standards that the decision could not be defended by any reasonable jurist."[322] As indicated, new rules will neither be *applied nor announced* on habeas unless the petitioner falls into one of two previously stated exceptions.[323] Given *Butler*'s broad definition of "new rule" and the rigor of the two exceptions to the "new rule" doctrine, one can conclude that the review available to state prisoners on federal habeas has been substantially diminished.

K. Death Penalty

The most significant death penalty case for Indiana practitioners is *Daniels v. State*.[324] This case is significant because the Indiana Supreme Court has chosen to adopt the federal habeas "new rule" doctrine and apply the same to Indiana postconviction proceedings.[325] In *Daniels*, the defendant was convicted of felony murder, among other charges, and sentenced to death. At the penalty phase, the prosecutor made statements concerning personal characteristics of the victim. The statements probably offended the rulings in *Booth v. Maryland*[326] and *South Carolina v. Gathers*[327] because descriptions of the victim's personal characteristics and descriptions of the emotional impact of the crime on the victim's family, both of which involve factors not known to the defendant at the time of the offense, are unrelated to the blameworthiness of the defendant and, therefore, are inconsistent with the reasoned decision-making required in capital cases.[328]

Daniels presented the *Booth* claim in post-conviction proceedings. The Indiana Supreme Court rejected the claim on the merits.[329] The United States Supreme Court granted certiorari and remanded the case for reconsideration in light of *Gathers*.[330]

On remand, the Indiana Supreme Court abandoned its established rule on retroactivity,[331] noting that its prior position had been influenced

---

322. *Id.* at 1219 (Brennan, J., dissenting).
323. *Id.* at 1218.
324. 561 N.E.2d 487 (Ind. 1990).
325. *Id.* at 489.
326. 482 U.S. 496 (1987).
327. 109 S. Ct. 2207 (1989).
328. *See* South Carolina v. Gathers, 109 S. Ct. 2207 (1989); Booth v. Maryland, 482 U.S. 496 (1987).
329. Daniels v. State, 528 N.E.2d 775 (Ind. 1988).
330. *See Gathers*, 109 S. Ct. at 2207.
331. *See* Rowley v. State, 483 N.E.2d 1078, 1082 (Ind. 1985) (a new rule should

by then-existing federal case law.[332] The court found that federal revisions, as set forth in *Teague v. Lane*[333] and *Penry v. Lynaugh*,[334] suggested that an analogous revision was appropriate for Indiana.[335] Thus, the court adopted the principle that new rules will not be applied in Indiana collateral proceedings unless the rule falls within one of two exceptions: (1) The rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe; and (2) the rule requires the observance of procedures implicit in the concept of ordered liberty and without which the likelihood of an accurate conviction is seriously diminished.[336] The court, while noting that the State was not asserting waiver, concluded that *Booth* and *Gathers* announced a new rule, and that rule did not qualify under either exception.[337]

Clearly, the majority decision in *Daniels* narrows the scope of available review in postconviction proceedings. This restriction is damaging, particularly to death penalty litigants, because of the dynamic nature of death penalty law.[338] The narrowing scope of state and federal review can be seen as part of the ongoing effort to accord greater finality to criminal judgments. Finality may have virtue, but the vice of finality is uncorrected error.

---

be applied retroactively and, thus, be available in postconviction proceedings if the rule is directly designed to enhance the reliability of criminal trials rather than being only tangentially related to truth finding).

332. *Daniels*, 561 N.E.2d at 488-89.

333. 489 U.S. 288 (1989).

334. 109 S. Ct. 2934 (1989).

335. *Daniels*, 561 N.E.2d at 489.

336. *Id.* The court noted that the second exception has been defined, in federal cases, as requiring a new rule that "must not only improve accuracy, but also alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id.* (quoting Sawyer v. Smith, 110 S. Ct. 2822, 2831 (1990)). The court also pointed out that the exceptions may prove inadequate and other particularized exceptions may be required. *Id.* at 490 n.3.

337. *Id.* at 490-91. Justice DeBruler dissented and observed that the court had previously addressed the merits of the *Booth* claim in Daniels's direct appeal from denial of postconviction relief. *Id.* at 492 (DeBruler, J., dissenting). *See* Daniels v. State, 528 N.E.2d 775 (1988). Given this fact and that the remand order called for the court to address the same issue again in light of *Gathers*, the dissent concluded that the threshold question of whether to address the merits was not before the court. *Daniels*, 561 N.E.2d at 492 (DeBrueler, J., dissenting).

338. Recall that under the federal definition, a rule is a "new rule" unless the challenged procedure "was so clearly invalid under then prevailing legal standards that the decision could not be defended by any reasonable jurist." *Butler*, 110 S. Ct. at 1219 (Brennan, J., dissenting). Thus, a slight variation in the application of a principle may trigger the "new rule" doctrine. Dynamic areas of the law inevitably involve many such slight variations.

IV. Conclusion

The United States Supreme Court and the Indiana courts continue to allocate a large portion of their respective dockets to criminal cases. Working through the implicit tension between our interest in crime enforcement and our interest in procedural fairness is a never-ending process.