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### III. PROBLEMS IN DEFENDING A DRUG CASE

PHILIP R. MELANGTON, JR.\*

#### INTRODUCTION

A few years ago, defending narcotic cases was something few lawyers would undertake. The stigma inherent in a clientele of dope pushers and addicts was certainly looked upon with disfavor by many in the profession. Today, it is quite different; the drug problem now cuts through every social and economic strata. The majority of drug and narcotic arrests and prosecutions today do not involve the commercial pusher or distributor of hard core narcotics. Rather, many of those involved are high school and college students, the sons and daughters of bank presidents, executives, businessmen, professional people and individuals of every other economic level from ghetto to high society.

Because of the enormity of the drug problem in the United States today, and because of the hue and cry of law and order zealots, there is a prevailing attitude that in dealing with the problem the end justifies the means.<sup>1</sup> This attitude is rampant not only with respect to the all too infrequent detection, apprehension and prosecution of top echelon distributors, but also to the millions of youngsters involved in the drug scene.

As a result, law enforcement officers at all levels resort to methods which in any other area would be considered reprehensible. There is more illegal searching, more entrapment and more police perjury here than in any other field.<sup>2</sup> Because of the heralded drug problem, these tactics are excused by Machiavellian judges both at the trial and appellate levels. Therefore, as more and more people are prosecuted for narcotic and drug violations, more and more legal practitioners are called upon to appear as defense counsel and to

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1. See Lindesmith, *The Narcotic Lobby and the Drug Problem*, 8 VAL. L. REV. 591 (1974).

2. See, e.g., Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-1962*, 4 CRIM. L. BULL. 549 (1962); D. BERNHEIM, *DEFENSE OF NARCOTIC CASES*, § 3.11 (1973).

understand the practical problems peculiar to drug related cases. It is the purpose of this article to point out these problems and to point out the legal difficulties the practitioner may encounter in a drug defense case.

### TRAFFIC AND POSSESSION: PENALTIES

Criminal penalties relating to drugs and narcotics are found in both our federal and state laws. Whether a person, at a given time, is prosecuted in federal or state court depends primarily upon who made the arrests since both federal and state laws are normally violated at the same time. Whether one can be prosecuted at both levels remains to be seen.<sup>3</sup> Federal and state laws proscribe generally the same conduct and concern the same drugs; only the penalties differ.

#### *Indiana and Federal Provisions Compared*

In Indiana, the Uniform Narcotic Drug Act<sup>4</sup> was enacted in 1935. It remained without change until the penalties were increased both in 1957 and in 1961.<sup>5</sup> Also in 1961, there was added the Indiana Dangerous Drug Act.<sup>6</sup> In 1971, marihuana was deleted from the definition of "narcotic drugs" in the Narcotic Act and added to the definition of "dangerous drugs" in the Drug Act.<sup>7</sup> This had the effect of reducing the possible penalty for marihuana offenses. As a nar-

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3. See *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959); *United States v. Lanza*, 260 U.S. 377 (1922), for the proposition that double jeopardy is not involved when there is joint federal and state jurisdiction. *But see Ashe v. Swensen*, 397 U.S. 436 (1970); *Waller v. Florida*, 397 U.S. 387 (1970); *Benton v. Maryland*, 395 U.S. 784 (1969), wherein most of these legal foundations were destroyed.

4. IND. ANN. STAT. § 10-3519 (Cum. Supp. 1973), IND. CODE § 35-24-1-1 (1971) (repealed effective Oct. 1, 1973) [hereinafter cited in text as Narcotic Act].

5. The 1957 amendment raised the penalty for any unauthorized possession of a narcotic drug from a fine of up to \$100.00 and imprisonment for not less than 60 nor more than 100 days, to a fine of up to \$1,000.00 and imprisonment of not less than one year nor more than two years. The 1961 amendment created the offense of possession with intent to sell with a penalty of not less than 5 nor more than 20 years with a fine of up to \$2,000.00; it also raised the penalty for sale from 2 to 5 years to 5 to 20 years and increased the maximum fine from \$1,000 to \$2,000. In 1961, the penalty for simple (unauthorized) possession was raised to not less than 2 nor more than 10 years.

6. IND. ANN. STAT. § 35-3331 (1969), IND. CODE § 16-6-8-1 (1971) [hereinafter cited in text as Drug Act].

7. In *People v. McCabe*, 49 Ill.2d 338, 275 N.E.2d 407 (1971), the Supreme Court of Illinois held that the classification of marihuana with narcotics for the purpose of penalty was an unconstitutional violation of equal protection.

cotic, penalties had ranged from an indeterminate sentence of from 5 to 20 years for a first offense or 20 years to life for a subsequent offense of selling or possessing with intent to sell, to a penalty of 2 to 10 years for a first offense or 5 to 20 years for a subsequent offense of simple possession.<sup>8</sup> Defined as a "dangerous drug" rather than a "narcotic drug," the penalty for possession or sale of marihuana became from 1 to 10 years for a first offense and 2 to 15 years for a subsequent offense.<sup>9</sup> If, however, the first offense involves simple possession of any dangerous drug (with the exception of possession of more than 25 grams of marihuana or more than 5 grams of hashish), the court may impose a determinate sentence of not less than thirty days nor more than one year.<sup>10</sup> Because the statute makes the imposition of the reduced sentence of one year or less discretionary with the court, the conviction of first-offense possession is still considered a felony since the maximum penalty provided by the statute is not less than one nor more than ten years in the state prison.<sup>11</sup> While the 1971 amendment had the effect of reducing the penalties for marihuana violations, it eliminated any differentiation between sale and simple possession where the quantity exceeds 25 grams.<sup>12</sup>

It should be noted that under both the Narcotic Act and the Drug Act, simple possession requires no intent and is, therefore, a "strict liability" offense. This absence of requisite proof of *mens rea* for conviction of a felony raises questions beyond the scope of this article and will be left for further inquiry.<sup>13</sup> The only misdemeanors contained in the Narcotic Act or Drug Act are found in the "common nuisance" sections.<sup>14</sup> Each provides that any structure or conveyance involved in illegally using, keeping or selling drugs or narcotics shall be deemed a common nuisance, and no person shall

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8. IND. ANN. STAT. § 10-3538 (Cum. Supp. 1973), IND. CODE § 35-24-1-20 (1971) (repealed effective Oct. 1, 1973).

9. IND. ANN. STAT. § 35-3338 (Cum. Supp. 1973), IND. CODE § 16-6-8-10 (1971).

10. *Id.*

11. This is analogous to the discretionary sentencing of a year or less for theft of property of a value of less than \$10.00 under the Theft Act. See IND. ANN. STAT. § 10-3039(1) (Cum. Supp. 1973), IND. CODE § 35-17-5-12 (1971). Regardless of the sentence imposed, it is a felony conviction because of the maximum penalty provided by the Indiana legislature.

12. In 1973, the legislature, as will be discussed *infra*, radically changed the law in Indiana with respect to offenses committed after October 1, 1973.

13. See Brady, *Strict Liability Offenses: A Justification*, 8 CRIM. L. BULL. 217 (1972).

14. See IND. ANN. STAT. § 10-3531 (Cum. Supp. 1973), IND. CODE § 35-24-1-13 (1971) (repealed effective Oct. 1, 1973); IND. ANN. STAT. § 35-3340 (Cum. Supp. 1973), IND. CODE § 16-6-8-7 (1971).

keep, maintain or visit such structure or conveyance. The penalty is a fine of from \$25.00 to \$100.00, and up to six months imprisonment. Only if the defendant is arrested with drugs or narcotics in his possession in a structure or conveyance can he negotiate for a misdemeanor conviction.

Both the Indiana Drug Act and Narcotic Act contain offenses with respect to the possession or control, with the intent to violate any of the provisions of the Act, of any hypodermic needle or syringe or any instrument adapted for the use of drugs or narcotics by injection. These are commonly called paraphernalia offenses. Strangely, the offense carries possible imprisonment penalties of from 1 to 10 years and 2 to 15 years for first and subsequent offenses, respectively, under the Drug Act, but only 1 to 5 years and 2 to 10 years for first and subsequent offenses, respectively, under the Narcotic Act.<sup>15</sup>

The strict liability provisions of the Drug Act for simple possession, without a clear definition of a dangerous drug—which by technical definition includes any drug requiring a prescription—seems unduly harsh. Since the statute can be read to require that the prescription be solely for the possessor and the drug be in a labeled container, one could imagine endless possibilities of violation.

Federal criminal laws pertaining to narcotics have been with us since the turn of the century, beginning with the Harrison Act and evolving through the Internal Revenue Codes of 1939 and 1954, and the Narcotic Control Act of 1956. Initially, federal jurisdiction was based either upon illegal importation or upon the imposition of a tax.<sup>16</sup> Illegal importation was prohibited as well as receipt, concealment or sale after importation. If unexplained possession was shown at the trial, such was deemed to be sufficient evidence to authorize conviction.<sup>17</sup> Also prohibited was the purchase, sale, dispensing or

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15. For the Drug Act proscriptions, see IND. ANN. STAT. §§ 35-3333(g) and (h) (Cum. Supp. 1973), IND. CODE § 16-6-8-3 (1971). For the penalties thereof, see IND. ANN. STAT. § 35-3338 (Cum. Supp. 1973), IND. CODE § 16-6-8-10 (1971). For the Narcotic Act proscriptions, see IND. ANN. STAT. § 10-3520 (Cum. Supp. 1973), IND. CODE § 35-24-1-2 (1971) (repealed effective Oct. 1, 1973). For the penalties thereof, see IND. ANN. STAT. § 10-3538 (Cum. Supp. 1973), IND. CODE § 35-24-1-20 (1971) (repealed effective Oct. 1, 1973).

16. See 21 U.S.C. §§ 174 and 176 (1970) (repealed by Pub. L. No. 91-513, Oct. 27, 1970); 26 U.S.C. §§ 4704, 4705 and 4744 (1970) (repealed by Pub. L. No. 91-513, Oct. 27, 1970).

17. See *Harris v. United States*, 359 U.S. 19 (1959).

distributing of narcotics, except in the original stamped packages or in pursuance of a written order of the buyer, and the acquisition of marihuana without having paid the proper tax. Again, proof of possession created a presumption of guilt. Thus, while the Federal statutes did not make possession a crime, the mere proof of possession was sufficient to sustain a conviction either for illegal importation or failure to pay the tax.<sup>18</sup> But the Supreme Court of the United States, in *Leary v. United States*,<sup>19</sup> completely emasculated this simplicity of prosecution. Stricken as a violation of due process was the presumption of knowledge of illegal importation.<sup>20</sup> Stricken as a violation of the self-incrimination clause of the fifth amendment was conviction for failure to comply with the tax provisions.<sup>21</sup>

Obviously, *Leary* created a dilemma so far as federal enforcement in the field was concerned. No prosecutions could be maintained for failure to pay the tax, and no longer could mere possession justify a conviction where jurisdiction was based upon illegal importation. In enacting the Comprehensive Drug Abuse Prevention and Control Act of 1970,<sup>22</sup> Congress threw traditional jurisdictional problems to the wind. Rather than rely upon its power over imports and to levy taxes, Congress, in Title II,<sup>23</sup> the Controlled Substances Act, made findings and declarations concerning health and general welfare and the effect of drugs upon interstate commerce. It then proceeded to enact complete regulatory and criminal legislation.<sup>24</sup> Drugs and narcotics were lumped together under the label "controlled substances" and placed into five separate schedules according to their potential for abuse and physical dependence.<sup>25</sup> Provision was made for updating and republishing the schedules semi-annually during the two-year period beginning one year after its

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18. *Id.*

19. 395 U.S. 6 (1969).

20. *Id.* at 53.

21. *Id.* at 29.

22. Pub. L. No. 91-513 (Oct. 27, 1970) (now codified in scattered sections of cts. 13-16, 21 U.S.C.).

23. 21 U.S.C. §§ 801-904 (1970).

24. The constitutionality of the Act under the commerce clause has been upheld by the Fifth Circuit in *United States v. Lane*, 461 F.2d 343 (1972) and by the Sixth Circuit in *United States v. Scales*, 464 F.2d 371 (1972) based upon the United States Supreme Court's decision in *Perez v. United States*, 402 U.S. 146 (1971), which dealt with loansharking.

25. 21 U.S.C. § 812 (1970).

effective date and annually thereafter.<sup>26</sup> Power was delegated to the United States Attorney General to make additions and deletions of substances under certain conditions.<sup>27</sup>

Conduct with regard to controlled substances was also classified under three prohibited categories of acts designated A, B and C. Offenses and penalties are now determined by matching a prohibited act with the schedule in which the controlled substance is listed. The most severe penalties are provided for prohibited acts A involving Schedules I and II controlled substances. Prohibited acts B and C concern manufacturers, distributors and dispensers who are required to keep a register and who fail to comply with the regulatory provisions. Prohibited acts A are directed to everyone else and are the subject of the majority of the criminal prosecutions. These prohibited acts, found at 21 U.S.C. § 841, are defined simply as knowingly or intentionally manufacturing, distributing or dispensing a controlled substance or possessing such substance with intent to distribute or dispense. There follows an intricate system of punishment ranging from imprisonment of one year and a \$5,000 fine<sup>28</sup> to 15 years and a \$25,000 fine,<sup>29</sup> depending upon the schedule in which the controlled substance is listed and upon whether the drug is a narcotic or a non-narcotic.<sup>30</sup> Second and subsequent offenders face double the maximum sentence if Schedule I, II or III substances are involved.<sup>31</sup> Special parole terms ranging from 2 to 6 years must be added to any imposition of imprisonment depending also upon the schedule involved.<sup>32</sup> Anyone who is at least eighteen years of age and who violates Section 841(a)(1) by distributing any controlled substance to anyone under 21 years of age is subject to double the maximum fine and imprisonment for a first offense and treble punishment if he has a prior offense of the same nature.<sup>33</sup> Attempts and conspiracies have the same maximum penalties as do substantive violations.<sup>34</sup> The Act also provides even greater penal-

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26. *Id.*

27. 21 U.S.C. § 811 (1970).

28. 21 U.S.C. § 844(a) (1970).

29. 21 U.S.C. § 841 (b)(1)(A) (1970).

30. Schedule I of 21 U.S.C.A. § 812 (1970) contains both narcotic and non-narcotic drugs without any clear definition as to which is which.

31. 21 U.S.C. § 841 (1970).

32. *Id.*

33. 21 U.S.C. § 845 (1970).

34. 21 U.S.C. § 846 (1970).

ties of up to 25 years imprisonment if the defendant is charged with being, and is found to be, a special drug offender as defined in 21 U.S.C. §§ 849-51. Any attempt to increase the sentence because of prior convictions must be made by a filing of a separate information prior to trial and a separate hearing thereon after conviction is also required.<sup>35</sup>

To say the least, the Act is complicated, not only in determining the amount of punishment involved in a particular case, but also in defining the illegality of conduct. One improvement over prior federal legislation is a special provision for simple possession, *i.e.*, possession without intent to dispense or distribute. Section 844 of Title 21 provides for a maximum term of imprisonment of one year and a fine of \$5,000 for a first offense and 2 years and a fine of \$10,000 for a subsequent offense. This section (in the case of a first offender) also provides for informal probation and the withholding of judgment with a dismissal and discharge if probation is satisfactorily carried out. Such discharge and dismissal cannot be deemed a conviction for any subsequent purposes and, if the defendant is under the age of 21 at the time of the offense, the entire record may be expunged.<sup>36</sup>

Section 841(b)(4) provides that anyone who distributes a small amount of marihuana for no remuneration shall be treated as provided for in Section 844 (simple possession). The problem is that nowhere does the Act define a "small" amount of marihuana.

The Act also contains numerous other provisions to help combat the drug problem. "No knock" search warrants are authorized by Section 879; forfeiture of property is provided for in Section 881; and compulsory testimony with immunity is set forth in Section 844. Section 885 provides that no exemption or exception need be negated in pleading or proof and the burden is on the defendant to establish such a defense. Section 886, it should be noted, authorizes payment of money to informants.

Title III<sup>37</sup> of the Act makes it unlawful to import controlled substances into the United States. Again, the penalties depend

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35. 21 U.S.C. § 851 (1970). The reasoning in *Lawrence v. State*, \_\_\_ Ind. \_\_\_, 286 N.E.2d 830 (1972), should require bifurcated trials in Indiana.

36. *Cf.* notes 9 to 11 *supra* and accompanying text.

37. 21 U.S.C. §§ 951-66 (1970).

upon the prohibited acts, which are classified as A and B, and upon the classification of the controlled substances in Title II. Generally, there is a maximum penalty of 15 years and a \$25,000 fine for importation of Schedule I or II narcotic drugs and a maximum penalty of 5 years and a \$15,000 fine for the importation of a controlled substance which is not a narcotic drug in Schedule I or II.<sup>38</sup> Special parole terms are also provided. Second and subsequent offenses are subject to double the maximum for a first offense.<sup>39</sup> Attempts and conspiracies are identically punishable.<sup>40</sup>

### *Indiana Provisions Compared*

In 1973 the General Assembly of the State of Indiana enacted legislation completely changing and confusing the Drug and Narcotic Laws in this state. Apparently awed by the wisdom of the Federal Controlled Substance Act, the General Assembly did its best to imitate it. In 1971, in addition to transferring marihuana from the Narcotic Act to the Drug Act, the legislature had also added to the Drug Act any drug appearing in Schedules I through IV of the Controlled Substance Act, 21 U.S.C. § 812. This had the effect of including within the Indiana Drug Act everything which was in the Narcotic Act and conduct with regard to any "narcotic drug" could be prosecuted under either of the two acts. With the less severe penalties set forth in the Drug Act, there was confusion as to the penalty for sale or possession of a narcotic drug. It depended for the most part upon how the prosecutor drafted the charges.

As noted, it seems that the 1973 legislation was a further attempt to emulate the Federal Controlled Substance Act. First of all, Public Law 144 amended the Drug Act by deleting from it all references to marihuana, LSD and the drugs appearing on the four schedules of the federal act.<sup>41</sup> Secondly, the Indiana legislature enacted Public Law 335 which specifically repealed the 1935 Narcotic Act and attempted to copy the Federal Controlled Substance Act. Public Law 335 contains five schedules and criteria for scheduling

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38. 21 U.S.C. § 960. See also note 30 *supra* and accompanying text.

39. 21 U.S.C. § 962 (1970).

40. 21 U.S.C. § 963 (1970).

41. What remains in the Drug Act's definition of dangerous drugs are (1) those drugs which require a prescription, (2) those which, because of their toxicity or other harmful effect, are not safe to use except by a licensed practitioner, and (3) those which the Board of Pharmacy may determine have qualities similar to dangerous drugs.

which are, for the most part, identical to the Federal Act.<sup>42</sup> Prohibitive acts A, B and C are practically the same as those found in the Federal Act.<sup>43</sup> Additionally, there is prohibited acts classification D which is a recodification of the common nuisance section of the Narcotic Act.<sup>44</sup> Not found in the Federal Act, but contained in Public Law 335, are provisions pertaining to paraphernalia intended to be used to commit drug offenses.<sup>45</sup>

Any similarity between the Indiana and the Federal Controlled Substance Acts ends when it comes to the penalties prescribed. Prohibited acts A, manufacturing, distributing, dispensing or dealing, or possession with such intent of any Schedule I or II narcotic drug, carries a maximum penalty of 15 years for a first offense and 30 years for a subsequent offense under the Federal Act,<sup>46</sup> but under the new Indiana Act carries a determinate sentence of not less than 5 years nor more than 20 years for a first offense and a determinate sentence of not less than 20 years nor more than life for a subsequent offense.<sup>47</sup> If the prohibited act A involves Schedule I or Schedule II non-narcotics, or anything in Schedule III, the punishment under the Federal Act is imprisonment for a maximum of 5 years for a first offense and 10 years for a subsequent offense,<sup>48</sup> but Indiana law provides the same determinate sentence of not less than 5 years nor more than 20 years for a first offense, and not less than 20 years nor more than life for subsequent offenses.<sup>49</sup> Thus, while the Federal Act provides for a considerably lower penalty with respect to marihuana and other non-narcotic drugs, as opposed to narcotic drugs, the Indiana legislation makes no such distinction. Consequently, Public Law 335 took an about-face from what the Indiana legislature had promulgated in 1971, and as of October 1, 1973 the penalty for distributing marihuana, or possession with such intent, is the same

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42. IND. ANN. STAT. §§ 10-3559b-3559k (Cum. Supp. 1973), IND. CODE §§ 35-24.1-2-3 to 35-24.1-2-1 (1971).

43. Compare IND. ANN. STAT. §§ 10-3561-3561b (Cum. Supp. 1973), IND. CODE §§ 35-24.1-4-1 to 35-24.1-4-3 (1971) with 21 U.S.C. §§ 841-43 (1970).

44. IND. ANN. STAT. § 10-3561c (Cum. Supp. 1973), IND. CODE § 35-24.1-4-3.5 (1971).

45. IND. ANN. STAT. § 10-3561(c) (Cum. Supp. 1973), IND. CODE § 35-24.1-4-3.5 (1971).

46. 21 U.S.C. § 841 (1970).

47. IND. ANN. STAT. § 10-3561(a)(1)(i) (Cum. Supp. 1973), IND. CODE § 35-24.1-4-2(1)(i) (1971).

48. 21 U.S.C. § 841 (1970).

49. IND. ANN. STAT. § 10-3561(a)(1)(ii) (Cum. Supp. 1973), IND. CODE § 35-24.1-4-2(1)(ii) (1971).

as that for offenses relating to heroin.<sup>50</sup>

If a Schedule IV substance is involved, federal law calls for a maximum sentence of 3 years,<sup>51</sup> while Indiana law provides for a minimum penalty of 2 years and a maximum of 10 years.<sup>52</sup> Further, the federal penalty for a Schedule V substance is a one year maximum,<sup>53</sup> while the Indiana Act provides for a minimum of one year and a maximum of five years.<sup>54</sup> Simple possession without intent to distribute *any* controlled substance is a misdemeanor punishable by imprisonment for not more than one year under the Federal Act,<sup>55</sup> while the Indiana Act provides for a minimum determinate sentence of two years and a maximum of ten years.<sup>56</sup>

It is to be noted that the Indiana law retains the provisions for a discretionary sentence of a determinate period not exceeding one year for a first offender who possesses not more than 25 grams of marihuana nor more than 5 grams of hashish.<sup>57</sup> Regardless of the imposition of the discretionary lower sentence, however, the offense constitutes a felony.<sup>58</sup> The 1973 legislation, however, increased the penalty for simple possession of a non-narcotic, such as marihuana, from an indeterminate one year to ten years, as had been provided under the Drug Act, to a determinate sentence of not less than two nor more than 10 years for any such offense committed after the October 1, 1973 legislation. This legislation makes the maximum penalty in Indiana ten times as great as that for the same offense under the Federal Act.<sup>59</sup> Both laws, however, provide that the judgment of the court may be withheld and proceedings deferred for a first offense of simple possession.<sup>60</sup> The Indiana law requires a guilty

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50. The constitutionality of such a provision is questionable. See *People v. McCabe*, 49 Ill.2d 338, 275 N.E.2d 407 (1971).

51. 21 U.S.C. § 841 (1970).

52. IND. ANN. STAT. § 10-3561(a)(1)(iii) (Cum. Supp. 1973), IND. CODE § 35-24.1-4-2(1)(iii) (1971).

53. 21 U.S.C. § 841 (1970).

54. IND. ANN. STAT. § 10-3561(a)(1)(iv) (Cum. Supp. 1973), IND. CODE § 35-24.1-4-2(1)(iv) (1971).

55. 21 U.S.C. § 844 (1970).

56. IND. ANN. STAT. § 10-3561(c) (Cum. Supp. 1973), IND. CODE § 35-24.1-4-3.5 (1971).

57. *Id.*

58. See note 11, *supra*, and accompanying text.

59. Compare IND. ANN. STAT. § 10-3561(c) (Cum. Supp. 1973), IND. CODE § 35-24.1-4-3.5 (1971) with 21 U.S.C. § 844 (1970).

60. IND. ANN. STAT. § 10-3561g (Cum. Supp. 1973), IND. CODE § 35-24.1-4-7 (1971); 21 U.S.C. § 844(b) (1970).

plea for such disposition; under the Federal Act it may be utilized after a trial and a finding of guilty.<sup>61</sup>

The propriety of Public Law 335 is questionable not only with respect to its practicality, but also to its legality. If the federally proscribed conduct was worthy of copying, the penalties should also have been copied.

The 1974 Indiana Legislature has further increased certain penalties effective April 1, 1974.<sup>62</sup> The penalty for a first offense of manufacturing, delivering or possession with such intent of a Schedule I or II narcotic drug has been increased to a determinate sentence of from 10 years to life, if the narcotic drug has an aggregate weight of 10 grams or more, regardless of whether it is pure or adulterated. The penalty for a first offense of simple possession of a Schedule I or II narcotic drug has been increased to a determinate sentence of not less than five nor more than 20 years if the aggregate weight of the narcotics is 10 grams or more, regardless of whether pure or adulterated. Ten grams is approximately one-third of an ounce. Since the weight applies both to pure and adulterated narcotic drugs, the penalties could be less with respect to pure heroin than for that which has been diluted with quinine, manitol or sugar and the weight thereby increased. Thus, eleven grams of heroin cut to 3 percent would subject the offender to a more severe penalty than would nine grams of 100 percent heroin.

#### THE DEFENSE

Important in the defense of any federal drug case is the 1966 Narcotic Addict Rehabilitation Act<sup>63</sup> dealing with drug addicted individuals. Title I of the Act, now 28 U.S.C. §§ 2901-06, provides for civil commitment before trial of persons charged with federal crimes and dismissal of charges upon successful completion of treatment. Title II, now 18 U.S.C. §§ 4251-55, provides for similar commitment in lieu of imprisonment for those convicted of a federal crime. Title III, now 42 U.S.C. §§ 3411-26, provides for civil commitment for persons not involved in the criminal process. In each case, the court must determine whether the individual is an addict

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61. *Id.*; see also note 3 *supra* and accompanying text.

62. See generally Pub. L. No. 152 (April 1, 1974).

63. 28 U.S.C.A. §§ 2901-06 (Cum. Supp. 1973).

as defined and whether he is likely to be rehabilitated through treatment. The first two Titles contain five provisions which exclude from eligibility the following: (1) persons currently accused or convicted of a federal crime of violence; (2) persons accused or convicted of selling or importing narcotics unless for personal use by reason of addiction; (3) persons against whom another felony charge is either outstanding or who have not completed sentence or parole; (4) persons with two or more prior felony convictions; and (5) persons with three prior civil commitments under state or federal programs.<sup>64</sup> The exclusion of those with prior felony convictions is not a violation of due process or equal protection.<sup>65</sup>

*Direct, Controlled and Observed Sales: Police Methodology*

In handling any drug or narcotic case, defense counsel must first determine whether his or her client is charged with sale or possession. Sale will be called distribution under federal law and delivery under the new Indiana law. Equally important is the determination whether a drug or a narcotic is involved and what that drug or narcotic actually is. If it is a sale or distribution case, the determination should be made as to whether it is a direct sale, a controlled sale or an observed sale. In a direct sale case, the defendant has unwittingly sold to an undercover agent or to an informant. A controlled sale is one where the informant is searched, found to be carrying no drugs or narcotics, given money which is marked or recorded, and sent to make a "buy" from a suspect. He is observed as he approaches the suspect, deals with him and returns. He is then searched again, and it is usually found that he is no longer in possession of the money, but is now in possession of drugs or narcotics. If the actual transaction takes place in the presence of the agent, it is an observed sale. If the authorities are not concerned about exposing their informant, an immediate arrest of the suspect is then made. If, however, that informant is necessary to make other cases, weeks or months may elapse before the suspect is finally arrested. In these cases, only the law enforcement agents testify; their testimony of the close, uninterrupted observation of the informant in dealing with the suspect, and returning, is consistently the same. The informant is never called upon to testify, and his identity is seldom

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64. 28 U.S.C.A. § 2901(g)(1)-(5) (Cum. Supp. 1973); 18 U.S.C. § 4251(f)(1)-(5) (1970).

65. See *Marshall v. United States*, 42 U.S.L.W. 4121 (U.S. Jan. 8, 1974).

revealed. In a direct sale case, naturally, the undercover agent or informant must testify. Yet, often because his cover must remain intact, arrests are not made until long after the transaction.

Familiarity with the methods employed by law enforcement officials to apprehend narcotic violators is required for effective defense work. Very few cases are made by surveilling a suspected seller and waiting until he sells to an addict. Such an approach is tedious and time consuming. Sellers, also, are by nature suspicious and will not sell to a complete stranger. Thus, the use of informants in narcotic and drug cases is probably more prevalent than in any other area of law enforcement. Here, the informant not only supplies information, but assists in making cases and setting up dealers by arranging for them to sell drugs to an undercover agent or to the informant in the presence of an agent. He is often a user or minor dealer himself so that his contacts and knowledge are valuable. Usually, he has been arrested but is given a "break" if he can help the authorities to make other cases. So long as he produces, he is not prosecuted, or if prosecuted, his case is dismissed. Sometimes, he is paid either in money or in drugs to support his habit. Often, he is paid according to the number of cases he can make. He is, therefore, motivated to manufacture cases. He will do anything to make a case. On many occasions, he induces someone to obtain drugs or narcotics for him by playing upon sympathies. This method of inducement is not restricted, however, to the informant. It is often undertaken by the law enforcement official himself who is introduced to the subject by the informant. This results in a direct sale case. Observed sales become direct sales when the informant himself testifies to the transaction. Often, to conceal the role played by the informant, what was actually an observed sale is testified to as a direct sale by the officer once he appears in court.

### *Entrapment*

In sale cases, whether direct, controlled or observed, the area of entrapment must be explored. As noted by the Court in *Sherman v. United States*,<sup>66</sup> entrapment is a defense "when the criminal design originates with the officials, and they implant in the mind of an innocent person the disposition to commit the alleged offense

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66. 356 U.S. 369 (1958).

and induce its commission in order that they may prosecute.”<sup>67</sup> It is not a defense when the defendant is ready, willing and able to commit the offense and is merely afforded the opportunity. In this respect, his predisposition to commit the instant offense is an issue. Relevant prior conduct, whether resulting in convictions or not, is admissible regardless of whether the defendant takes the stand.<sup>68</sup> Yet, that conduct must not be remote in time<sup>69</sup> and it has been held error to instruct the jury that the defendant has to be “an innocent person” before he can avail himself of the defense of entrapment.<sup>70</sup>

Many law enforcement officials are of the opinion that they can destroy any entrapment defense if they are able to make a second “buy” from the defendant. This could possibly be correct if the buys were separated in time and made by different undercover agents. It should be remembered, however, that in *Sherman*, as well as in many other cases where the entrapment defense prevailed, there was more than one “buy.” As stated in *Sherman*:

[It] makes no difference that the sales for which petitioner was convicted occurred after a series of sales. They were not independent acts subsequent to the inducement, but part of a course of conduct which was the product of the inducement.<sup>71</sup>

The issue of whether entrapment is a question of law for the court, or one of fact for the jury, often arises. In each case, it depends upon the evidence. The distinction can be seen in *Sherman* and in *Masciale v. United States*,<sup>72</sup> decided on the same day. In each case, the question of entrapment was submitted to the jury with proper instruction and in each case a conviction resulted which was affirmed by the appellate court. In *Sherman*, the Supreme Court reversed the decision of the appellate court because the evidence had established entrapment as a matter of law based upon undisputed testimony. In *Masciale*, the Court affirmed because conflict-

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67. *Id.* at 372; see also *Sorrells v. United States*, 287 U.S. 435, 442 (1932). Note should be taken that the Supreme Court recently reaffirmed the basic premises of *Sherman* and *Sorrells* in *United States v. Russell*, 93 S.Ct. 1637 (1973).

68. 356 U.S. at 376.

69. *Id.*

70. *Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962).

71. 356 U.S. at 374.

72. 356 U.S. 386 (1958).

ing testimony had to be resolved by the jury. Thus, it has been said that the factual issue of entrapment is a question for the jury, unless, as a matter of law, the defendant establishes beyond a reasonable doubt that he was entrapped.<sup>73</sup> Once the defense offers any evidence to raise that issue, it is error not to submit the question to the jury with proper instruction, *i.e.*, the court cannot hold as a matter of law that there is no entrapment.<sup>74</sup> The defendant has the burden of going forward with the defense of entrapment, but the government has the burden in the entire case to prove guilt beyond a reasonable doubt.<sup>75</sup> Or, to put it another way, the defendant has the burden of showing that he was induced to commit the offense by the agent and the prosecution has the burden of showing that, even so, the defendant was willing and ready to act without persuasion and was awaiting any opportunity to commit the offense.<sup>76</sup> Unfortunately, the only way to raise the defense of entrapment is to plead not guilty and to go to trial. There is no way to raise the issue by a plea in bar.<sup>77</sup> However, it should be raised during trial before the case is presented to the jury.<sup>78</sup>

The defense of entrapment is roughly the same whether the case is in federal or state court. Indiana follows the test set forth in *Sorrells v. United States*<sup>79</sup> and *Sherman*.<sup>80</sup> The major requirement for the defense is that the criminal conduct must be the product of the creative activity of the law enforcement officials or their agents. As stated above, if the defendant has a predisposition to commit the offense, affording him the opportunity will not thereby afford an entrapment defense. Whether he was ready and willing is an issue which must be resolved.<sup>81</sup>

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73. *Accardi v. United States*, 257 F.2d 168 (5th Cir. 1958).

74. *See Sorrells v. United States*, 287 U.S. 435, 452 (1932); *see also Pierce v. United States*, 414 F.2d 163 (5th Cir. 1969).

75. *United States v. Silva*, 180 F. Supp. 557 (S.D.N.Y. 1959).

76. Opinion of Judge Learned Hand in *United States v. Sherman*, 200 F.2d 880 (2d Cir. 1952). This opinion reversed Sherman's first conviction and remanded the case for a new trial. The second conviction was affirmed 240 F.2d 949 (2d Cir. 1952), but was reversed by the Supreme Court 356 U.S. 369 (1952).

77. 287 U.S. at 452.

78. *Ervin v. State*, \_\_\_ Ind. App. \_\_\_, 289 N.E.2d 131 (1972).

79. 287 U.S. 435 (1932).

80. 356 U.S. 369 (1958). For the Indiana decision illustrative of these two cases, *see Smith v. State*, \_\_\_ Ind. \_\_\_, 281 N.E.2d 803 (1972).

81. *See Reiff v. State*, 256 Ind. 105, 267 N.E.2d 184 (1971) (purchases were induced by an informant, but defendant's prior drug activity was clearly demonstrated).

*Smith v. State*<sup>82</sup> is an example of the schemes police officials employ to entrap a defendant. While Smith had a predisposition to engage in other unlawful conduct, he had none with respect to drugs. Evidence of predisposition to commit the offense on the part of the defendant is often, though unfortunately, couched in terms of whether the law enforcement officials had probable cause for suspicion.<sup>83</sup> This, in at least one instance, has evolved into a holding that reasonable suspicion alone is sufficient without probable cause; in *Childs v. United States*<sup>84</sup> the court supported this holding with citations to *Sorrells*.<sup>85</sup> In *Sorrells*, however, testimony as to the defendant's general reputation for illegal conduct was insufficient to show previous disposition. There must be evidence that the defendant had engaged in the same type of conduct prior to the transaction in question<sup>86</sup> before the defense of entrapment can be defeated. The confusion in terminology stems from the failure to distinguish between probable cause to warrant the law enforcement officials to seek out the defendant in the first place, and the evidentiary requirement on the part of the prosecution to overcome the defense at trial. As stated in *Smith v. State*, the terms are "closely related but yet somewhat different."<sup>87</sup>

Rarely will the defense of entrapment arise in a possession case, unless the possession comes about in preparation for a sale which has been induced and the prosecution elects to charge possession rather than sale. In *Gray v. State*,<sup>88</sup> the defendant was charged both with possession and sale but convicted only of sale. There had been no evidence of any prior activity with narcotics. Based solely on the evidence that the sale was set in motion by the police, the conviction was reversed because of entrapment. The court pointed out that had the conviction been for possession, as in *Spight v. State*,<sup>89</sup> the entrapment defense would not have prevailed. The same result was

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82. \_\_\_ Ind. \_\_\_, 281 N.E.2d 803 (1972). See also *United States v. Silva*, 180 F. Supp. 557 (S.D.N.Y. 1959).

83. See *May v. State*, \_\_\_ Ind. \_\_\_, 289 N.E.2d 135 (1972); *Walker v. State*, 255 Ind. 65, 262 N.E.2d 641 (1970).

84. 267 F.2d 619 (D.C. Cir. 1958).

85. 287 U.S. 435 (1932).

86. *Id.* at 441.

87. 281 N.E.2d at 805.

88. 249 Ind. 629, 231 N.E.2d 793 (1967).

89. 248 Ind. 286, 226 N.E.2d 895 (1967).

reached in *Stein v. United States*,<sup>90</sup> where the defendant's possession existed before the government agents set the trap. Where the possession with which the defendant is charged takes place only after he is induced to sell, there is no reason to abandon the defense.

Of course, in basing a defense on entrapment, the defendant is admitting that with which he is charged, but contending that he did it only because he was illegally induced to do so by law enforcement officials or their agents. It is in the nature of confession and avoidance. The mere raising of the defense of entrapment itself aided the court in affirming the conviction in *Johnson v. State*,<sup>91</sup> where the issue was the sufficiency of the evidence. It has been held, however, that denial and entrapment are not inconsistent defenses and that a defendant can deny the conduct and still say that if the jury believes that it did occur, then the government's evidence as to how it occurred indicates entrapment.<sup>92</sup>

Whether an entrapment defense can be made without the defendant's taking the stand will depend upon the particular case and how the evidence develops during the trial. In *Sherman*, the defendant did not testify. The defense was sufficiently established as a matter of law from the testimony of the prosecution witnesses. Indeed, many reported cases uphold the defense solely upon prosecution evidence. If, however, in an observed or controlled sale case, the undercover agent or the informant who made the "buy" does not testify, there is no way to show the inducement except through the defendant's testimony. In *Henderson v. United States*,<sup>93</sup> entrapment was found upon the basis of the defendant's testimony which was not rebutted by the government. Thus, if the prosecution will not allow its informant to be "smoked out," the only witness to the induced transaction is the defendant himself. When the informant engages in the transaction, whether he testifies or not, the defense should be provided with information concerning his activities.<sup>94</sup>

There is another defense approach, ancillary to the entrapment defense, when the transaction is between the defendant and an

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90. 166 F.2d 851 (9th Cir. 1948).

91. 255 Ind. 589, 266 N.E.2d 57 (1971).

92. *Hansford v. United States*, 303 F.2d 219 (D.C. Cir. 1962).

93. 261 F.2d 909 (5th Cir. 1959).

94. *United States v. Peterson*, 170 F. Supp. 251 (D. Utah 1959).

undercover agent or an informant acting on the agent's behalf. Unless the defendant is a seller who has a supply on hand, he is asked to procure drugs for the informant or agent. In this situation, the defendant is not a seller of drugs, but is merely obtaining drugs for the buyer, *i.e.*, an agent for the buyer acting on the buyer's behalf: if the buyer provocateur acting for the government is not guilty of an offense, neither is the defendant who is merely acting as a conduit.<sup>95</sup>

It should, perhaps, be noted that where the entrapment defense is not available because of a showing of predisposition on the part of the defendant, its rationale often prevails to prevent a conviction when the governmental conduct rises to a level of "creative activity"<sup>96</sup> and itself performs essential parts of the offense which might not otherwise have been committed.<sup>97</sup>

It must be emphasized that for the entrapment defense to succeed, the inducement to commit the offense must come from law enforcement officers or their agents. Entrapment is not available as a defense when the inducement comes from a private individual,<sup>98</sup> or from an individual who unwittingly leads an officer to a suspect<sup>99</sup> and no inducement is made by the officer himself.

### *Search and Seizure*

Sale cases do not require a search and seizure. Possession cases, however, which ordinarily do not afford the defense of entrapment, usually are the result of a search. The legality of that search must be tested in light of the cases under the fourth and fourteenth amendments. While Indiana's constitutional proscription<sup>100</sup> against unreasonable searches and seizures is identical to that of the United

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95. See *Henderson v. United States*, 261 F.2d 909 (5th Cir. 1958); *Adams v. United States*, 220 F.2d 297 (5th Cir. 1955); *United States v. Sawyer*, 210 F.2d 169 (3d Cir. 1954).

96. *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *but see United States v. Russell*, 411 U.S. 423 (1973). In *Russell* the Court reserved the question of conduct on the part of law enforcement officials alleged to have been "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . ." *Id.* at 431-32.

97. *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972). In the light of *United States v. Russell*, however, the Supreme Court vacated and remanded the case for further consideration. *United States v. McGrath*, 412 U.S. 936 (1973).

98. 468 F.2d 1027.

99. *Thompson v. State*, \_\_\_ Ind. \_\_\_, 290 N.E.2d 724 (1972).

100. IND. CONST. art. I, § 11.

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States Constitution, tactically the fourteenth amendment should always be raised to preserve a federal question.<sup>101</sup> In federal court, an objection to the admission of illegally obtained evidence can be waived unless a motion to suppress is filed before trial.<sup>102</sup> If the motion is overruled, objection to the evidence at trial should still be made to preserve the record for appeal.<sup>103</sup> In Indiana, the legality of a search and seizure may be raised for the first time by objection to the evidence, but it is better practice to file a motion before the trial commences.<sup>104</sup>

The law of search and seizure is no different with respect to narcotics offenses than it is in other areas of criminal activity and will not be belabored. However, since we are dealing with possessory crimes, automatic standing to object to the illegality is afforded.<sup>105</sup> Probable cause is necessary to obtain a search warrant and probable cause to arrest is necessary to justify a search incident to an arrest. The fact that the object of the search is drugs is insufficient by itself to excuse police from knocking and announcing their authority before executing a search warrant.<sup>106</sup>

Often the defendant is arrested while in an automobile. *Preston v. United States*<sup>107</sup> and *Chimel v. California*<sup>108</sup> should be read together with *Paxton v. State*<sup>109</sup> for the requirement that the search be contemporaneous with the arrest, be confined to the immediate vicinity and be restricted to weapons within the defendant's reach. *Cooper v. California*,<sup>110</sup> which occasionally has been cited erroneously to get around *Preston*, probably now has some bearing because the Indiana Narcotics Act was amended in 1971 to provide for seizure and forfeiture of automobiles.<sup>111</sup> There must, however, be

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101. See *California v. Krivda*, 409 U.S. 33, *rehearing denied*, 409 U.S. 1068 (1972).

102. FED. R. CRIM. P. 41.

103. *Lawn v. United States*, 355 U.S. 339 (1958).

104. A pre-trial motion is not required as a matter of law; the practice is one of tactics.

105. *Jones v. United States*, 362 U.S. 257 (1960).

106. *State v. Dusch*, \_\_\_ Ind. \_\_\_, 289 N.E.2d 515 (1972). See also *United States v. Pratter*, 465 F.2d 227 (7th Cir. 1972).

107. 376 U.S. 364 (1964).

108. 395 U.S. 752 (1969).

109. 255 Ind. 264, 263 N.E.2d 636 (1970). See also *Sayne v. State*, \_\_\_ Ind. \_\_\_, 279 N.E.2d 196 (1972).

110. 386 U.S. 58 (1967).

111. IND. ANN. STAT. § 10-3553 (Cum. Supp. 1973), IND. CODE § 35-24-4-1 (1971).

probable cause to believe that the automobile is being used in the perpetration of the crime. No traffic arrest can justify an "exploratory" search.<sup>112</sup>

*Possession: A Legal Definition*

Possession can either be actual or constructive; the latter depending upon whether the particular defendant was exercising dominion or control over the substance in question and whether he had knowledge of its presence.<sup>113</sup> Joint possession in a room can be inferred when the drugs are in plain view of all the occupants.<sup>114</sup> Visitors in a home would not be in constructive possession of drugs secreted therein unless there was other evidence showing their connection with the drugs.<sup>115</sup> In *Carrao v. State*,<sup>116</sup> marijuana found in the trunk of a car was held to be possessed by the owner of the car, who was a passenger in the front seat, and by the driver, but not by the two passengers in the rear seat. Excluding the rear seat passengers from any inference of knowledge is obvious. It is difficult to accept, however, any concept that a driver of an automobile, owned and occupied by another, is chargeable with knowledge of anything contained in the locked trunk with no additional evidence to show that knowledge.

In *Bellamy v. State*,<sup>117</sup> the defendant stopped his car for his companion to get out. As the companion exited the automobile, police officers saw the defendant hand him an envelope and when the companion was apprehended, the envelope was found to contain heroin. The defendant was charged and convicted both with possessing and dispensing the heroin. At the trial, the companion testified that it was his heroin and that he had not received it from the defendant. The conviction was affirmed as to both counts, however,

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112. *Sayne v. State*, \_\_\_ Ind. \_\_\_, 278 N.E.2d 196 (1972); *Paxton v. State*, 255 Ind. 264, 263 N.E.2d 636 (1970). It should be noted that this statement of law is substantially unchanged despite the recent Supreme Court decisions in *Robinson v. United States*, 94 S.Ct. 467 (1973) and *Gustafson v. Florida*, 42 U.S.L.W. 4068 (U.S. Dec. 11, 1973) which authorized searches in certain circumstances but failed to liberalize the permissible scope as defined in *Chimel v. California*, 395 U.S. 752 (1969).

113. *Greeley v. State*, \_\_\_ Ind. App. \_\_\_, 301 N.E.2d 850 (1973); *United States v. Jones*, 362 F. Supp. 707 (E.D. Pa. 1973).

114. *Thomas v. State*, \_\_\_ Ind. \_\_\_, 291 N.E.2d 557 (1973).

115. *Corrao v. State*, \_\_\_ Ind. App. \_\_\_, 290 N.E.2d 484 (1972).

116. *Id.*

117. \_\_\_ Ind. \_\_\_, 286 N.E.2d 401 (1972).

even though it seems perfectly natural for one to hand a departing passenger an object about to be left behind.

While standing to challenge illegal searches and seizures in possessory crimes is automatic with no need to show any possessory interest,<sup>118</sup> many instances will arise where the defendant is charged with possession resulting from a search directed to another and where the possibility of showing constructive possession seems remote. Rather than take a chance, however, it is still tactically advisable to attack the legality of that search.

In *Butler v. State*,<sup>119</sup> it was held that the defendant, charged with possession of heroin, had no standing to challenge the illegal search of an automobile he did not own or possess; yet, the conviction for possession of the heroin which was the product of the search was affirmed. The facts disclosed that the conviction should have been affirmed on the basis of actual possession and abandonment, rather than upon the question of standing.

Abandoned property cannot give rise to a question of illegal search because there is actually no search and any interest in the property has been terminated. This has resulted in an influx of what have come to be known as "dropsy" cases. The testimony of the officers is that as they approached the defendant, they saw him throw an object to the ground and walk away. Upon retrieving the object, the officers find the package to contain narcotic drugs. This testimony is generally accepted, with resulting convictions, even though it seems incredible that so many defendants would drop narcotics under the very noses of the police. The fact that the defendant was seen to drop the narcotics has been held sufficient to show that he had possession.<sup>120</sup> If, however, it can be shown that the defendant threw the package away because he knew he was going to be subjected to an illegal search, the package becomes the fruit of that illegality.<sup>121</sup>

Street searches cannot go beyond a pat down for weapons unless incident to a valid arrest. Any seizure of evidence beyond that

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118. *Jones v. United States*, 362 U.S. 257 (1960).

119. *\_\_\_ Ind. \_\_\_,* 289 N.E.2d 772 (1972).

120. *Patterson v. State*, 255 Ind. 22, 262 N.E.2d 520 (1970).

121. *Bowles v. State*, 256 Ind. 27, 267 N.E.2d 56(1971).

is the product of an illegal search.<sup>122</sup> However, after a defendant is in jail on a legitimate charge, anything found among his personal effects is not the product of an illegal search.<sup>123</sup>

*Graham v. State*<sup>124</sup> adopted the federal requirement that before narcotic drugs can be admitted into evidence or testimony can be received as to the laboratory findings, the prosecution must be able to show an unbroken chain of custody by the police from the time of the confiscation from the defendant to the presentation in the courtroom. Because of the nature of the evidence, the prosecution must successfully avoid any claim of tampering or substitution. These standards have been relaxed recently in *Butler v. State*<sup>125</sup> and *Cartwright v. State*.<sup>126</sup> In *Cartwright*, the court's conclusion was supported by a field test which is far from conclusive.<sup>127</sup>

Before anyone can be convicted of an offense involving narcotics or drugs, there must be proof that narcotics or drugs were involved. In *Burk v. State*,<sup>128</sup> the defendant was convicted of the use of narcotic drugs, to-wit: LSD. The conviction was reversed with instructions to sustain a motion to quash because the Narcotic Act did not include LSD within its definition of a narcotic drug. In *Healy v. State*,<sup>129</sup> the defendant was convicted of possession of a dangerous drug, to-wit: marihuana. At the time of the offense, marihuana had not been transferred from the Narcotic Act to the Drug Act. Even though no motion to quash had been filed, the conviction was reversed because of a failure of proof.

A very dangerous and unwarranted conclusion was reached in *Pryor v. State*<sup>130</sup> which upheld a conviction for selling a dangerous drug. The affidavit did not appear in the opinion and, therefore, the

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122. *Sibron v. New York*, 392 U.S. 20 (1968); *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Del Toro*, 464 F.2d 520 (2d Cir. 1972). *But cf.* *Adams v. United States*, 407 U.S. 143 (1972).

123. *Ramirez v. State*, \_\_\_ Ind. App. \_\_\_, 286 N.E.2d 219 (1972); *Farrie v. State*, 255 Ind. 681, 266 N.E.2d 212 (1971). *Contra*, *Brett v. United States*, 412 F.2d 401 (5th Cir. 1969).

124. 253 Ind. 525 N.E.2d 652 (1970).

125. \_\_\_ Ind. \_\_\_, 289 N.E.2d 772 (1972).

126. \_\_\_ Ind. App. \_\_\_, 289 N.E.2d 763 (1972).

127. A field test will not, in and of itself, show heroin, but it will suggest a derivative of opium. *See D. BERNHEIM, DEFENSE OF NARCOTIC CASES* § 4.02 (1973).

128. \_\_\_ Ind. \_\_\_, 275 N.E.2d 1 (1971).

129. \_\_\_ Ind. App. \_\_\_, 288 N.E.2d 781 (1972).

130. \_\_\_ Ind. App. \_\_\_, 291 N.E.2d 370 (1972), *aff'd in part, rev'd in part on other grounds*, \_\_\_ Ind. \_\_\_, 296 N.E.2d 125 (1973).

specificity of the charge is unknown. A field test had been negative as to marihuana and there was testimony that the substance in question was dried ragweed. The court of appeals rejected the argument that there was a failure of proof. It cited the definition of "sale" in the Drug Act<sup>131</sup> as including an offer regardless of an ability to complete the transaction and concluded that it did not matter whether the material delivered was in fact a dangerous drug. It is difficult to imagine how any conviction with respect to dangerous drugs can be upheld in the absence of any dangerous drug, or that the legislature intended such a result.

In *Slettvet v. State*,<sup>132</sup> the drugs were not put in evidence because none were found in the defendant's possession. The court held that when the drugs themselves are not placed in evidence, there must be expert testimony to show that a dangerous drug was in fact involved. Since there was no expert testimony, the conviction was reversed. This, apparently, is the first Indiana case even suggesting the sufficiency of any evidence of the existence of drugs, other than the drugs themselves, together with testimony as to their chemical analysis.

*Slettvet* was followed by *Pettit v. State*.<sup>133</sup> There, again, the narcotics were unavailable for evidence, but the addict to whom the heroin was sold was allowed to testify as an expert that its effect was the same as that of heroin. The conviction was affirmed because the qualification of the witness was within the discretion of the trial court.

In *Pryor v. State*,<sup>134</sup> there was also a conviction on a count charging possession of marihuana in addition to the sale count previously discussed. The marihuana was not in evidence. Citing *Pettit*, the appellate court affirmed on the basis of the non-expert testimony of others who were present at the pot party.

In a prosecution for possession of paraphernalia adapted for use in injecting narcotics or drugs, there must be proof of intent unlawfully to administer and use narcotic drugs. In *Taylor v. State*,<sup>135</sup> a

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131. IND. ANN. STAT. § 35-3332 (Cum. Supp. 1973), IND. CODE § 16-6-8-2 (1971).

132. \_\_\_ Ind. \_\_\_, 280 N.E.2d 806 (1971).

133. \_\_\_ Ind. \_\_\_, 281 N.E.2d 807 (1972).

134. \_\_\_ Ind. App. \_\_\_, 291 N.E.2d 370 (1972).

135. 256 Ind. 170, 267 N.E.2d 383 (1971).

conviction was reversed because of the absence of such proof. The requisite intent may be shown by needle marks on the arm,<sup>134</sup> together with withdrawal symptoms,<sup>137</sup> an attempt to conceal, and narcotic history.<sup>138</sup> Flight alone is insufficient.<sup>139</sup>

With an emphasis being placed upon treatment and cure of addiction, the use of narcotic drugs by physicians is being carefully scrutinized by law enforcement authorities. Definite standards must be maintained and a distinction is drawn between treatment and maintenance. In *Linder v. United States*,<sup>140</sup> the Supreme Court held that if a physician administers a drug in good faith based upon his professional judgment, there can be no criminal offense. This is a subjective, factual question which must be resolved in each case and often conflicts with the objective treatment vis-a-vis maintenance test used by the Bureau of Narcotics and Dangerous Drugs.

#### CONCLUSION

Experience has shown that during the period when prescribed penalties for drug offenses were increasing, there was no deterrent effect because the incidence of drug use also continued to increase. Recently, as noted, penalties have been lowered and restrictions on suspended sentences eliminated. Indiana, however, has increased the penalties as of October 1, 1973. It will be interesting to see the result. Attempts to control drug use must be on a trial and error basis. Lowering evidentiary standards and permitting illegal conduct on the part of law enforcement authorities are not desirable solutions.

No one particular area of law enforcement can operate in isolation. Dangerous precedents evolving from the fight against the drug problem will remain to haunt us in all areas where individual liberties are involved. While the concern of enforcement officers is understandable, they cannot be permitted to violate the law. As has been aptly stated in two separate dissenting opinions in the same case:

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136. *Irvin v. State*, \_\_\_ Ind. \_\_\_, 282 N.E.2d 825 (1972); *Dabner v. State*, \_\_\_ Ind. \_\_\_, 279 N.E.2d 797 (1972); *Stevens v. State*, \_\_\_ Ind. \_\_\_, 275 N.E.2d 12 (1971).

137. *Sargent v. State*, \_\_\_ Ind. App. \_\_\_, 287 N.E.2d 795 (1972).

138. *Eskridge v. State*, \_\_\_ Ind. \_\_\_, 281 N.E.2d 490 (1972); *Von Hauger v. State*, 255 Ind. 666, 266 N.E.2d 197 (1971).

139. *Bradley v. State* \_\_\_ Ind. App. \_\_\_, 287 N.E.2d 759 (1972).

140. 268 U.S. 5 (1925).

[It] is desirable that criminals should be detected, and to that end all available evidence should be used. It is also desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. . . . I think it a lesser evil that some criminals should escape than that the government should play an ignoble part.<sup>141</sup>

. . . .

Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against this pernicious doctrine this court should resolutely set its face.<sup>142</sup>

These admonitions from the past are equally applicable today. As pointed out by Justice Hunter in *Slettvet v. State*,<sup>143</sup>

[We] take judicial notice of the frightening rise of illicit drug use occurring in this country which is rapidly approaching epidemic proportions. However, we cannot allow this fact to result in a lessening of the State's requirement of proving each element of the crime beyond a reasonable doubt for this requirement has long been a metaphysical cornerstone of our criminal law.<sup>144</sup>

We of the legal profession are concerned and alarmed about the drug problem today. We should be equally concerned and alarmed about the erosion of our judicial process.

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141. *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

142. *Id.* at 485 (Brandeis, J., dissenting).

143. \_\_\_\_\_ Ind. \_\_\_\_\_, 280 N.E.2d 806 (1971).

144. *Id.* at \_\_\_\_\_, 280 N.E.2d at 809.

