the County Board, the Auditor must deliver a copy of the ditch duplicate to the County Treasurer.

(4) The County Treasurer within fifteen days after receiving the copy of the ditch duplicate must mail to each landowner being assessed a statement showing the amount of the assessment and the amount of the current installment.

(5) The assessed property owner may, at the time any installment is due, choose to pay either the installment then due or the entire amount of the assessment still outstanding. Similarly, the Drainage Board may at any time redeem the bonds issued to finance the construction or reconstruction.

I believe the foregoing procedure is not only in accord with the provisions of the Drainage Code, but is also the simplest method of collecting the property assessments.

OFFICIAL OPINION NO. 17

September 12, 1966

CRIMINAL LAW—Taking Samples of Blood Without Search Warrant—Application of Rule in Schmerber v. California—Necessity That Sample be Taken by Medical Personnel.

Opinion Requested by Supt. Robert A. O'Neal, Indiana State Police.

This is in response to your request for an opinion concerning what the recent decision of the Supreme Court of the United States on the taking of a blood sample for use as evidence of intoxication by the police will have on the law of the State of Indiana on this same subject.

Your request raises two specific questions for consideration:

"1. Are the holdings in *Alldredge v. State,* 239 Ind. 256, 156 N.E. 2d 888 (1959), or *Alder v. State,* 239 Ind. 68, 154 N.E. 2d 716 (1959) in any way overruled by *Schmerber v. California,* — U.S. —, 86 S. Ct. 1826 (1966) ?

"2. Is it lawful under Indiana law for the police to secure blood samples for alcoholic intoxication tests in the same manner that such samples were obtained in *Schmerber v. California,* — U.S. —, 86 S. Ct. 1826 (1966) ?"

In *Rochin v. California,* 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 205 (1952), where evidence was introduced concerning the contents of the defendant's stomach when such contents had been revealed by use of a stomach pump on the defendant against his will, the court held that such evidence was improper and inadmissible. However, there was more than the mere involuntary subjection to a stomach pump involved in that case. The California police had, without a warrant, broken into the bedroom of the defendant while he and his wife were in bed. The defendant immediately smallowed two capsules that were resting on a bedside table. The police grabbed hold of the defendant and attempted to pry open his mouth and extract the capsules. Failing in this they rushed the defendant to a hospital where, against his will, the stomach pump was used. The United States Supreme Court decided the case on the full circumstances, holding that the total behavior of the police in this situation was violative of the due process clause of the Fourteenth Amendment. The court said:

> ". . . This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomachs contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation." 342 U.S. at 172.

The court's decision did not rest on any application of the Fifth Amendment to the United States Constitution which

was the reason for the separate concurring opinions of Mr. Justice Black and Mr. Justice Douglas.

In *Breithaupt v. Abram,* 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448 (1957) the defendant was the driver of an automobile involved in an accident wherein he was injured and rendered unconscious and taken to a hospital. While at the hospital and still unconscious, the attending physician, at the request of a state patrolman, withdrew a blood sample from the defendant and delivered this sample to the patrolman. The defendant objected to testimony concerning the analysis of this sample. The Court held that the Federal rule excluding evidence obtained through violations of the Fourth and Fifth Amendments was not applicable to state courts, and did not consider whether those amendments were in fact violated. This decision was based on *Wolf v. Colorado,* 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949). The Court further held that the withdrawal of blood from an unconscious person by the physician treating that person was not behavior which would shock the conscience, as was the behavior of the police in *Rochin,* and that testimony as to the analysis of that sample did not violate due process.

The most recent case is *Schmerber v. State of California,* 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), the opinion being handed down on June 20, 1966. In that case the defendant was also being treated in a hospital, and the blood sample was taken at the request of the policeman. However, the defendant was conscious at the time and objected, both personally and through his attorney, to the withdrawal of any sample of his blood. Further, the Supreme Court had by this time overruled *Wolf v. Colorado* and held that the exclusionary rule was applicable to state courts. *Mapp v. Ohio,* 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). The Supreme Court, therefore, squarely faced the question of whether the extraction of a blood sample against the will of the defendant was a violation of the Fourth Amendment protection from unreasonable search and seizure, or the Fifth Amendment protection from self-incrimination.

As to the Fourth Amendment, the court decided that the defendant's rights had not been violated even though the

police officer did not have a search warrant and even though the defendant objected to the taking of the sample. Relative to the lack of search warrant, the court pointed out that the evidence that was sought is of a fleeting nature and to obtain a warrant would result in the evidence being destroyed before the sample could be obtained. The court further held, on the authority of *Breithaupt,* that the taking of a blood sample is not an unreasonable invasion of the person's body. The court strongly emphasized, however, that the finding that the invasion of the body was reasonable was based entirely on the facts presented to them, and that it might not so decide on a different set of facts. The court specifically said:

> "Finally, the record shows that the test was performed in a reasonable manner. Petitioner's blood was taken by physician in a hospital environment according to accepted medical practices. We are thus not presented with the serious questions which would arise if a search involving use of medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment —for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain." 86 S. Ct. at 1836

As to the Fifth Amendment, the court held that defendant had not been compelled to testify against himself within the meaning of that amendment. The court based its decision on a line of cases distinguishing between the use of the body of the defendant, or some portion thereof, as evidence, and compelling the defendant to verbally incriminate himself. The court said:

> ". . . The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." 86 S. Ct. at 1832

The Supreme Court, then has held, first, that blood samples, like finger prints, constitute real evidence rather than testimonial evidence and are therefore not prohibited by the Fifth Amendment, and second, that the taking of a blood sample without a search warrant and against the protest of the defendant is not a violation of the Fourth Amendment provided the sample is taken by medical personnel in a medical situation.

The Indiana Supreme Court has never ruled on the question of whether the taking of a blood sample from a defendant over his objections is a violation of the prohibition against unreasonable search and seizure contained in both the Fourth Amendment of the United States Constitution and Art. 1, § 11 of the Indiana Constitution, nor has it directly answered the question as to whether introduction of testimony concerning such a sample would be in violation of the self-incrimination provisions of the Fifth Amendment to the United States Constitution and Art. 1, § 14 of the Indiana Constitution. There is, however, ground to believe that if faced with that specific question the court would follow the precedent of the United States Supreme Court.

The provisions concerning unreasonable search and seizure in the United States and the Indiana Constitutions are almost identical. Article 1, § 11 of the Indiana Constitution reads:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, [searches and seizures,] shall not be violated;[,] and no warrant[s] shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person[s] or thing[s] to be seized." (Bracketed material added.)

The bracketed material in the above passage indicates the instances where the wording of the Fourth Amendment of the United States Constitution differs from the Indiana provision. Such differences are not such that they would require the Indiana Supreme Court to hold that the taking of a blood sample is a violation of the unreasonable search or seizure provision

of the Indiana Constitution, although not of the Federal Constitution.

As to the provision against self-incrimination found in both Constitutions, the decision of the court in *Alldredge v. State*, 239 Ind. 256, 156 N.E. 2d 888 (1959), is pertinent. The question in that case was whether it was proper for the lower court to permit a police officer to testify that the defendant had refused to take a drunkometer test. To answer this question it was first necessary for the court to decide if the results of such a test would be admissible if such a test had been administered over the objections of the defendant. The court held that absent any showing that the test involved would constitute an invasion of the person the testimony was admissible. The court's decision was based on the same distinction between forced verbal testimony and the use of the body as evidence drawn by the Supreme Court in *Schmerber*. The court's opinion did refer to invasions of the body, specifically to blood samples, and did indicate that such an invasion would violate the person's rights. This statement, however, is a dictum and does not create binding precedent.

Despite the fact that the Indiana Supreme Court has never ruled on the constitutionality of the introduction into the record of evidence concerning a blood sample taken over the objections of the defendant, the court has held such evidence not proper in several specific instances. The reason for excluding such evidence in those instances was statutory rather than constitutional. Acts 1881 (Spec. Sess.), ch. 38, § 275, Burns IND. STAT. ANN., § 2-1714, provides, in part:

> "The following persons shall not be competent witnesses:
>
> . . .
>
> "Fourth. Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases."

In *Chicago, L. S. & S. B. Ry. v. Walas*, 192 Ind. 369, 135 N.E. 150, 22 A.L.R. 1212 (1922), a civil action, the injured person was taken to a hospital in an unconscious state. A physician working in the emergency ward of the hospital no-

ticed and observed the injured person when he was first brought in. A few minutes later that physician was assigned to treat the injured person, but in the interval he had formed an opinion, based on his observation, as to whether that person was intoxicated. The trial court excluded all testimony by the physician, even that concerning the observations he had made prior to his becoming the injured person's attending physician, on the ground that any information or opinion was gained by the physician in the course of his professional business within the meaning of the above statute.

In *Alder v. State,* 239 Ind. 68, 154 N.E. 2d 716 (1958), a criminal action, the defendant was taken in an unconscious state to a hospital subsequent to a motor vehicle accident. The attending physician took a sample of his blood preparatory to giving him a blood transfusion, and, at the request of a state police officer, took more than was needed and gave the surplus to the officer for analysis. On the basis of the above statute, and the authority of *Walas,* the Indiana Supreme Court held that the physician could not testify concerning the extraction of the sample, thereby causing the sample to be unidentified and inadmissible as evidence.

In summary, the Indiana Supreme Court has never ruled on the constitutionality of the admission into evidence of evidence based on blood samples taken over the objections of the defendant. However, there appears to be nothing in the Indiana Constitution or in prior decisions of that court which would require that court to hold that the admission of such evidence would be unconstitutional, especially in view of the holdings of the United States Supreme Court. However, the Indiana Supreme Court has ruled that any evidence based on a blood sample taken by the physician who attends the defendant as a physician must be excluded for statutory reasons.

In answer to your specific questions, it is my opinion:

1. The holdings in the *Alldredge* case or the case of *Alder v. State* are in no way overruled by the *Schmerber* case because the *Alldredge* case did not directly concern blood samples or any other invasion of the body, while the *Alder* case was decided on statutory rather than constitutional grounds.

2. Since it appears that the blood samples obtained in the *Schmerber* case were obtained from the attending physician, it is probably lawful under the Constitution of the State of Indiana but not lawful under the statutes of the State of Indiana for the police to secure blood samples for alcoholic intoxication tests in the manner that such samples were obtained in the *Schmerber* case.

In answer to your implicit question as to whether police may obtain blood samples for alcoholic intoxication tests from drivers suspected of driving while under the influence of alcohol, I would venture a qualified yes. Any such sample must be taken under the conditions set out in *Schmerber,* specifically, by medical people in a hospital situation. On the other hand, the sample must not be taken by the physician who attends the person, and probably not by any other physician on duty in the hospital at the time, lest it be excluded by the statutory law of Indiana. In short, any such sample would have to be taken by a physician specifically employed for that purpose by the police body involved, the sample must be extracted in a hospital or under conditions very similar to a hospital situation, and the physician involved must in no way attempt to treat or advise treatments for the suspect.

Also, an aspect that has not arisen in any of the cases discussed above should be considered. There must be extremely good reasons for suspecting the person to be intoxicated. The taking of a blood sample as part of a routine examination, or even because the person displays some of the minor symptoms of inebriation, would probably be considered an unreasonable invasion of the person and a violation of the unlawful search provisions of both the Indiana and Federal Constitutions.