VII. Evidence

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A. Introduction

With rare exceptions,[1] Indiana evidence law progresses slowly and holds closely to the traditional concepts of the common law. This Survey Article collects the several important cases decided during the past year that continue this development of Indiana's common law of evidence.[2] A general word of caution is in order concerning the Indiana appellate courts' evidence cases. Most evidence issues arise in criminal cases, in which convicted defendants allege error in the admission of evidence against them or in the exclusion of evidence offered in their defense. A ruling in favor of the defendant could result in the reversal of the conviction and the release of the accused, something the courts seem loath to allow. Thus, many rulings on points of evidence, particularly those where the court disposes of the issue in a paragraph or two, should probably be interpreted as harmless error cases—cases in which the evidence against the defendant is so strong that the effect of the disputed evidence is negligible. Although the court does not treat these as harmless error cases, many seemingly contradictory opinions, upholding both trial courts that allow the state to introduce disputed evidence and those that prevent the defendant from introducing such evidence, can only be explained rationally in this way.[3]

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[1]*See, e.g.*, Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975) (adopting unique rule that prior statements of witnesses available for cross-examination are not hearsay); DeVaney v. State, 259 Ind. 483, 288 N.E.2d 732 (1972) (overruling prior cases that excluded expert opinions embracing the ultimate issue); Ashton v. Anderson, 258 Ind. 51, 279 N.E.2d 210 (1972) (setting out which crimes are admissible for impeachment); Bergner v. State, 397 N.E.2d 1012 (Ind. Ct. App. 1979) (one of the first cases in the country to adopt the silent witness theory for admitting photographs as substantive evidence). *See also* Ind. Code § 34-3-5-1 (1982) (news reporter's privilege); Ind. Code § 35-37-4-4 (Supp. 1983) (shield law for rape victims).

[2]The reader may also wish to refer to the Survey Article on criminal law and procedure for comments on the legislature's attempt to enact a "good faith" exception to the constitutionally mandated exclusionary rule. Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 Ind. L. Rev. 115, 129 (1984). This development is not covered in this Article.

[3]*Compare* Inman v. State, 270 Ind. 130, 383 N.E.2d 820 (1978) (finding that objections to defendant's cross-examinaton question concerning prior inconsistent statement were properly sustained because the question called for conclusion), *cert. denied*, 444 U.S. 855 (1979) *with* Cichos v. State, 246 Ind. 680, 208 N.E.2d 685 (upholding proof of a prior inconsistent statement by State on grounds that anything inconsistent or contradictory casts

B. Hearsay

1. Continuing Development of the Patterson *Rule.*—In the 1975 case of *Patterson v. State*,[4] the Indiana Supreme Court announced that the prior out-of-court statements of witnesses available for cross-examination were no longer to be considered hearsay. If a witness is present and available for cross-examination, then his or her prior statements are admissible for the truth of their contents. The prior statements need not be sworn or inconsistent with the witness' trial testimony.[5] Either litigant may take advantage of the *Patterson* rule. The cross-examiner may introduce prior inconsistent statements to impeach and contradict witnesses who testify against him.[6] However, a more litigated application of the *Patterson* rule has been the direct examiner's use of prior consistent statements to corroborate a witness' direct testimony. In the past year, Indiana courts have addressed three previously unsettled issues concerning the use of prior consistent statements as part of direct examination: (a) whether an available declarant must actually give direct testimony; (b) if so, how complete the testimony must be; and (c) if the witness-declarant does give extensive direct testimony, whether a cumulative prior statement that merely reiterates the direct testimony is admissible.

In *Lewis v. State*,[7] the Indiana Supreme Court settled the first of these issues—whether prior statements are admissible if the declarant is made available for cross-examination but is not actually called to testify. The court held that the central requirement for the admissibility of prior consistent statements is that the witness-declarant *must* give direct testimony about the events related in the statement:[8]

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doubt on witness's veracity), *reh'g denied*, 246 Ind. 680, 210 N.E.2d 363 (1965), *appeal dismissed*, 385 U.S. 76 (1966), *reh'g denied*, 385 U.S. 1020 (1967). *Compare* Shelby v. State, 428 N.E.2d 1241 (Ind. 1981) (defense witness prevented from stating opinion about defendant's state of mind) *with* Porter v. State, 271 Ind. 180, 391 N.E.2d 801 (1979) (prosecution witness allowed to give opinion on defendant's state of mind). *Compare* Ingram v. State, 426 N.E.2d 18 (Ind. 1981) (excluding defendant's cross-examination questions as beyond scope of direct) *with* Doty v. State, 422 N.E.2d 653 (Ind. 1981) (allowing state to ask questions that were arguably beyond scope of direct). *See also* Carter v. State, 412 N.E.2d 825, 830-31 (Ind. Ct. App. 1980) (concluding that seemingly inconsistent supreme court cases were really harmless error cases and that the supreme court had not intended to announce a change in an evidentiary rule).

[4]263 Ind. 55, 324 N.E.2d 482 (1975).

[5]*Cf.* FED. R. EVID. 801(d)(1)(A) (prior statement considered nonhearsay only if inconsistent and made under oath).

[6]This part of the rule has never presented any real problem in application. The only issue in this situation is whether the full foundation for prior inconsistent statements must be laid. *See* Cichos v. State, 246 Ind. 680, 208 N.E.2d 685 (requiring confrontation of witness with circumstances and details of prior inconsistent statement), *reh'g denied*, 246 Ind. 680, 210 N.E. 2d 363 (1965), *appeal dismissed*, 385 U.S. 76 (1966), *reh'g denied*, 385 U.S. 1020 (1967). This question has not been addressed by the Indiana Supreme Court. *Cf.* D.H. v. J.H., 418 N.E.2d 286, 295 (Ind. Ct. App. 1981) (requiring confrontation).

[7]440 N.E.2d 1125 (Ind. 1982), *cert. denied*, 103 S. Ct. 1895 (1983).

[8]*Id.* at 1130.

> [T]he key question in determining whether or not an abuse of the *Patterson* rule has occurred is whether the State has submitted evidence as to the relevant factual events in the case by directly examining (and thereby making him available for cross-examination) the witness-declarant about those facts. What we will not permit is for the State to put in substantive evidence of the witness-declarant's version of the facts solely through the admission of the witness' prior statement under the pretext of the *Patterson* rule. At some point the State must put the declarant of the prior statement on the witness stand and elicit direct testimony as to the facts at issue.[9]

In so holding, the court cited language from earlier cases stating that the *Patterson* rule was not intended to allow a party to use out-of-court statements as a substitute for available in-court testimony.[10] Although the court did not discuss any of the cases to the contrary, the opinion can be read as overruling *Dowdell v. State*[11] and *Little v. State*[12] sub silentio; cases in which prior statements were admitted despite the fact that the witness-declarants were not called to the witness stand.

A more difficult issue is the precise extent of direct testimony that must be elicited. Taken literally, *Lewis* seems to stand for the proposition that the witness must provide direct testimony as to all of the relevant events in order for his or her prior statements to be admissible. This is the interpretation given *Lewis* by the first district court of appeals in *B.M.P. v. State*.[13] In *B.M.P.*, the State introduced the declarant's prior statement under the *Patterson* rule before the declarant was called as a witness. Later in the trial, the State called the declarant, who testified to some general matters but refused to testify about the robbery in issue. The defendant did not claim any fifth amendment privilege; he simply refused to testify. He was found guilty of contempt and returned to prison. The court of appeals relied on the literal language of *Lewis* and held that if a declarant refused to testify about relevant facts, whether or not on

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[9] *Id.*

[10] The court cited Stone v. State, 268 Ind. 672, 678, 377 N.E.2d 1372, 1375 (1978) ("the use of prior statements . . . by the proponent of the witness in lieu of available and direct testimony . . . will no longer be sanctioned"); Samuels v. State, 267 Ind. 676, 679, 372 N.E.2d 1186, 1187 (1978) (using out-of-court statements "as a mere substitute for available in-court testimony" is a misapplication of *Patterson* rule); Flewallen v. State, 267 Ind. 90, 98, 368 N.E.2d 239, 243 (1977) (DeBruler, J., dissenting) (rule should not permit the state to prove its case solely through the use of prior statements, without even attempting to elicit the live testimony of sworn witnesses). *See also* C. McCormick, Handbook on the Law of Evidence § 251, at 601, 603 (2d ed. 1972) (offering statement in lieu of live testimony, merely tendering the witness for cross-examination, seen as serious danger).

[11] 429 N.E.2d 1 (Ind. Ct. App. 1981), *criticized in* Karlson, *Evidence, 1982 Survey of Recent Developments in Indiana Law*, 16 Ind. L. Rev. 191, 191-93 (1982).

[12] 413 N.E. 2d 239 (Ind. Ct. App. 1980).

[13] 446 N.E.2d 17 (Ind. Ct. App. 1983).

fifth amendment grounds, his prior statements could not be admitted because there had been no direct testimony about the facts in issue.[14]

It is doubtful that this is the result intended by the Indiana Supreme Court. To reach this result, the court of appeals had to surmise that *Lewis* overruled, or at least weakened, another supreme court decision, *Rapier v. State*,[15] decided only five months earlier. In *Rapier*, a state's witness gave some direct testimony but refused to testify about the event itself, asserting an invalid fifth amendment privilege. The State then offered into evidence the witness' prior statement about the robbery in question. Despite the fact that the refusal to testify made cross-examination practically impossible, the supreme court held the statement admissible under *Patterson*.[16] The position taken by the court in *Rapier* was consistent with a series of cases in which the prior statements of witnesses had been found admissible despite the fact that adequate cross-examination of the declarants had been difficult or impossible because they claimed a lack of memory,[17] lack of personal knowledge,[18] or the fifth amendment privilege.[19] A few months later when it decided *Lewis*, the court gave no indication that it intended to retreat from this holding.

Rapier and *Lewis* can be reconciled, however, and some guidance can be derived for determining when a prior statement may be used as a substitute for direct examination. The basic foundation requirement stated in *Lewis* is that the offering party must first call the declarant as a witness and attempt to elicit the relevant facts through direct examination.[20] No prior statements are admissible until after this attempt has been made. However, pursuant to *Rapier*, if the witness refuses to testify or claims a lack of memory, the prior statement is admissible despite the difficulty in cross-examining the witness. The *Patterson* rule only prohibits the use of out-of-court statements in lieu of *available* direct testimony,[21] and if a witness refuses to testify, his or her direct testimony becomes unavailable.

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[14] *Id.* at 20.

[15] 435 N.E.2d 31, 33-35 (Ind. 1982). The court in *B.M.P.* stated that "*Lewis* appears to be a retreat from the position stated in *Rapier*." 446 N.E.2d at 20.

[16] 435 N.E.2d at 35.

[17] *See* Lowery v. State, 434 N.E.2d 868, 870 (Ind. 1982); Arch v. State, 269 Ind. 450, 454, 381 N.E.2d 465, 468 (1978).

[18] *See* Balfour v. State, 427 N.E.2d 1091 (Ind. 1981).

[19] *See* Torrence v. State, 263 Ind. 202, 205, 328 N.E.2d 214, 216 (1975). *But see* Taggart v. State, 269 Ind. 667, 671, 382 N.E.2d 916, 919 (1978) (DeBruler, J., concurring) (arguing that successfully asserting fifth amendment prevents cross-examination and makes prior statements inadmissible hearsay). Interestingly, DeBruler also wrote the majority opinion in *Torrence*.

[20] *But cf.* Remsen v. State, 428 N.E.2d 241 (Ind. 1981) (holding that it is permissible to introduce the statement first and call the witness-declarant later for full examination).

[21] In *Patterson*, the court emphasized that "the *availability* of the declarant for cross-examination is required. It is our judgment that this safe-guard is of paramount importance . . . ." 263 Ind. at 58, 324 N.E.2d at 485 (emphasis added).

The Indiana Supreme Court's approach is troublesome. As long as the witness-declarant testifies and can be cross-examined fully about both the veracity of the prior statement and the credibility of his or her underlying observations, application of the *Patterson* rule is clearly correct because none of the usual hearsay dangers are present. However, when statements are admitted in the absence of an adequate opportunity to cross-examine the declarant because he or she refuses to testify or is unable to recall the events, then the hearsay dangers return. The opponent cannot interrogate the declarant and challenge the veracity of the statement if the declarant will not or cannot discuss it in court. To call such a statement admissible nonhearsay under the *Patterson* rule is to change the basic concept of hearsay: that an inability to test the veracity of the declarant requires that a statement be excluded unless it falls within an established exception to the hearsay rule.[22] Moreover, the *Patterson* rule is premised on having an available witness-declarant and when a witness-declarant cannot remember the facts or refuses to testify about them, the witness is unavailable for all practical purposes.

An analysis more true to the hearsay rule would be the approach suggested by Justices DeBruler and Prentice and by the first district court of appeals in *B.M.P.*: if the declarant cannot be cross-examined effectively, his or her prior statements do not fall within the *Patterson* rule, and should be considered hearsay.[23] This does not mean that the statements necessarily are inadmissible. The modern trend is to recognize that inability to remember or refusal to testify constitutes unavailability for purposes of the hearsay exceptions for declarations against interest and former testimony.[24] If the proponent can lay the foundation for either exception, the statement would be admissible. This approach would better assure that unreliable hearsay is excluded and that reliable statements are admitted by requiring either that the declarant be subject to cross-examination or that the statement meet the reliability criteria of the traditional hearsay exceptions.[25]

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[22]In *Patterson*, the court stated: "[T]he primary reason for excluding hearsay is because of its insusceptibility to the test of cross-examination." 263 Ind. at 57, 324 N.E.2d at 484 (citation omitted). *See* C. McCormick, *supra* note 10, § 245, at 583-84; M. Seidman, *The Law of Evidence in Indiana* 113-15 (1977); J. Tanford & R. Quinlan, Indiana Trial Evidence Manual § 16.1 (1982).

[23]Taggart v. State, 269 Ind. 667, 671-72, 382 N.E.2d 916, 919 (1978) (DeBruler, J. and Prentice, J., concurring); B.M.P. v. State, 446 N.E.2d 17, 20 (Ind. Ct. App. 1983).

[24]*See* Fed. R. Evid. 804(a)(1)-(3); *see also* C. McCormick, *supra* note 10, § 253 at 611-12.

[25]Many statements about which a declarant will refuse to testify, or will develop sudden "amnesia," will be statements against his or her penal interest. Although the Indiana Supreme Court has explicitly refused to recognize declarations against penal interest as a hearsay exception, Taggart v. State, 269 Ind. 667, 382 N.E.2d 916 (1978), many jurisdictions now allow such statements into evidence. *See, e.g.*, Fed. R. Evid. 804(b)(3). The Indiana Supreme Court's concern that an accused would present perjured third-party confessions under this exception probably is an exaggerated fear. First, such statements currently

At the opposite end of the spectrum is the situation in which a witness-declarant provides full and complete testimony on direct examination, showing a clear memory of the events, and the examiner seeks to introduce his or her prior statements that reiterate the direct but raise no new matters. Such cumulative evidence should be excluded on relevancy grounds as any purely repetitious testimony would be.[26] This objection was raised in *Lewis* but rejected by the supreme court, although that opinion disposes of this issue with no real discussion:

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> Appellant claims the trial court erred in admitting over his objection hearsay testimony. This testimony was elicited from [three] State's witnesses . . . [who] testified as to statements made to them by [the victim] both before and after the offense was committed. The subject matter of these statements had already been addressed by [the victim] in the direct and cross-examination.
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> Appellant now concludes . . . that abuse of the *Patterson* rule

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are admissible under *Patterson* if the defendant calls that third party as a witness, even if he or she asserts the fifth amendment. *See* Torrence v. State, 263 Ind. 202, 205, 328 N.E.2d 214, 216 (1975). Second, a penal interest exception could be modeled after the Federal Rules of Evidence, which require that a third-party confession offered to exculpate the defendant is only admissible if "corroborating circumstances clearly indicate the trustworthiness of the statement." FED. R. EVID. 804(b)(3). *See also* 5 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1477, at 358 (Chadbourn rev. 1974). Wigmore states that the fear of perjury

> is the ancient rusty weapon that has always been brandished to oppose any reform in the rules of evidence . . . . This would be a good argument against admitting any witnesses at all, for it is notorious that some witnesses will lie and that it is difficult to avoid being deceived by their lies. The truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent.
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> The only practical consequences of [excluding declarations against penal interest] are shocking to the sense of justice; for in its commonest application it requires . . . the rejection of a confession, however well authenticated, of a person . . . who has avowed himself to be the true culprit.

Id. at 358-59. Third, it has been suggested that restricting a defendant's ability to prove reliable third-party confessions violates his or her sixth amendment right to present exculpatory evidence. *See* Tague, *Perils of Rulemaking Process: The Development, Application, and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 GEO. L.J. 851 (1981). Adoption of the penal interest exception by Indiana would not greatly affect ultimate admissibility, but would bring a measure of rationality to this area.

[26] *See, e.g.*, Palmer v. State, 153 Ind. App. 648, 288 N.E.2d 739 (1972) (proper for trial court to prevent witness from repeating testimony already covered once); Hawkins v. State, 219 Ind. 116, 37 N.E.2d 79 (1941) (within court's discretion to stop repetitious questioning). *See generally* T. SMITH, TRIAL HANDBOOK FOR INDIANA LAWYERS § 231, at 181-82 (1982); J. TANFORD & R. QUINLAN, *supra* note 22, §§ 3.1 - 3.4, at 5-6; Brasswell, *Objections—Howls of a Dog Pound Quarrel*, 4 CAMPBELL L. REV. 339, 357-58 (1982); Denbeaux & Risinger, *Questioning Questions: Objections to Form in the Interrogation of Witnesses*, 33 ARK. L. REV. 439, 486-87 (1979); Karlson, *supra* note 11, at 193-94.

> occurs when it is used to . . . permit a *retelling* of her story through the admission of other witness testimony as to her prior statements concerning the facts at issue.
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> Appellent is not correct . . . .
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> We hold there was not improper application of the *Patterson* rule here. . . . [T]he *Patterson* rule was not used to admit substantive evidence "*in lieu of* available and direct testimony . . . ."[27]

Earlier *Patterson* rule cases had contained language strongly suggesting that purely cumulative prior statements, although not hearsay, might be excludable.[28] Unfortunately, the supreme court has never given an explicit answer to this question. Although *Lewis* appears to permit purely cumulative statements, the language used by the court is hardly definite enough to say that the matter is settled. Indeed, in light of the fact that the cases prior to *Lewis* seemed to imply the opposite result, it is not at all clear that the court in *Lewis* intended to open the door to the repetitious use of prior statements.[29] On this point, *Lewis* probably should be read as a harmless error case.[30]

2. Tacit Admissions.—It has long been the rule that the failure to deny an accusation can constitute a tacit admission that the accusation is true. The proponent of a tacit admission must demonstrate that the accusation was made in the presence of the accused person, that the accused heard and understood the accusation and had a realistic opportunity to deny it, and that the statement would ordinarily be denied by an innocent person. If this foundation is laid, then anything other than a clear denial may be allowed as evidence that the accused tacitly acknowledged the truth of the accusation.[31] Before 1982, tacit admissions were only ad-

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[27]440 N.E.2d at 1129-30 (quoting Stone v. State, 268 Ind. 672, 678, 377 N.E.2d 1372, 1375 (1978) (emphasis added)).

[28]*See*, Norton v. State, 408 N.E.2d 514, 522-23 (Ind. 1980) (consistent statement introduced on redirect was relevant for clarification after testimony became confused on cross-examination); Flewallen v. State, 267 Ind. 90, 368 N.E.2d 239 (1977) (statements were consistent with testimony but were relevant because more detailed and more incriminating); Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975) (statement was more incriminating and more revealing than testimony). *But see* Underhill v. State, 428 N.E.2d 759, 765-66 (Ind. 1981) (refusing to reverse because contents of statement "merely reiterated" the direct testimony; probably a harmless error case); Buttram v. State, 269 Ind. 598, 382 N.E.2d 166 (1978) (permitting other witnesses to repeat statements by victim; no discussion).

[29]The policy argument against allowing cumulative prior statements is simple. Because the rules of evidence generally will not permit a witness to tell his or her story once and then simply to start over at the beginning and tell it again, a few witnesses should not be allowed to do exactly the same thing merely because they happen to have made prior statements. The consequences might be that eventually, every attorney may have his or her witnesses prepare written statements before trial so they could "testify" twice.

[30]*See supra* text accompanying note 3.

[31]*See generally* C. McCormick, *supra* note 10, § 270, at 651-55. *But cf.* Gamble, *The Tacit Admission Rule: Unreliable and Unconstitutional—A Doctrine Ripe for Abandonment*, 14 Ga. L. Rev. 27 (1979).

missible when the accused person was a party-opponent so that the implied statement fell within the hearsay exception for admissions by the opposing party.[32] In *Moredock v. State*,[33] the Indiana Supreme Court combined the concept of tacit admissions with the *Patterson* rule to create a new rule of evidence: the prior tacit admissions of nonparty witnesses who are present and available for cross-examination are admissible nonhearsay to the same extent as their other prior statements. Moredock was convicted of rape and based his application for a new trial on newly discovered evidence, including evidence that the victim tacitly admitted that no rape occurred.[34] The supreme court remanded the case for a new trial, holding that the victim's tacit admission could "properly be considered by the jury as substantive evidence" on retrial.[35]

Moredock is a new extension of Indiana's unique hearsay rule which has developed since *Patterson*. Tacit admissions of parties traditionally have been admissible because the party-"declarant" is usually present and can explain why he or she failed to deny the acusation.[36] The extension of the *Patterson* rule to tacit admissions in *Moredock* still ensures that the accused person will be present at trial to explain any mitigating circumstances or misunderstandings surrounding a tacit admission. Under the *Patterson* rule only the prior statements of witnesses who are available for cross-examination are admissible non-hearsay. Therefore, under *Moredock*, only the tacit admissions of *available* non-party witnesses will be allowed. It is unlikely that this doctrine will be extended to other kinds of admissible hearsay because the absence of a declarant makes it impossible to verify that he or she truly heard, understood, and acquiesced in another's assertion of wrongdoing.[37]

3. Business Records.—Under the business records execption to the hearsay rule, a foundation for the admission of business records is laid by calling a witness to authenticate them. Indiana courts traditionally have

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[32]*See* J. TANFORD & R. QUINLAN, *supra* note 22, § 17.5, at 86-87, and cases cited therein. For example, in Robinson v. State, 262 Ind. 463, 317 N.E.2d 850 (1974), a witness testified that he heard the defendant's mother say, "You shouldn't have thrown the baby against the wall," and the defendant respond, "Shut up." *Id.* at 465, 317 N.E.2d at 852.

[33]441 N.E.2d 1372 (Ind. 1982).

[34]The opinion does not indicate the exact nature of the accusation, the nature of the victim's response, or the circumstances, other than that the witness who allegedly heard the tacit admission went to see the victim immediately after the incident. The court's discussion of the effect of an equivocal response and the absence of a clear denial, *id.* at 1374, indicates that the victim may have failed to deny the witness' assertion that the rape charge was fabricated to force the victim's boyfriend to move out.

[35]*Id.*

[36]*See* M. SEIDMAN, *supra* note 22, at 118-23; J. TANFORD & R. QUINLAN, *supra* note 22, §§ 17.1, 17.5, at 85, 85-86.

[37]*See generally* C. MCCORMICK, *supra* note 10, § 270, at 652 (courts receive tacit admissions with caution because it is easy to manufacture this kind of evidence, and it may be extremely damaging to the defendant).

required that either the person who made the entry or the entrant's direct supervisor identify the document.[38] Although Indiana courts reiterated this rule in two decisions during the survey period,[39] the supreme court's decision in *Pitts v. State*[40] appears to contravene these long-established requirements for laying a proper business record foundation.

In *Pitts*, the supreme court affirmed the trial court's admission of fingerprint cards prepared by various *state* prison officials[41] after authentication by a *federal* agent, an FBI fingerprint specialist, as business records of the FBI.[42] The supreme court conceded that the authenticating witness was not the actual entrant; therefore, the only other accepted method of laying a business records foundation was to call someone under whose supervision the entries were made. The witness called in *Pitts*, however, was not the supervisor of the state officials who prepared the entry. As far as the trial record shows, he was not even a supervisor of the FBI. Nor were the state prison officials who made the entries employees or agents of the FBI.

At first glance *Pitts* appears to represent a major shift in Indiana law regarding the admissibility of business records, overruling the series of recent cases requiring that the entrant or his supervisor identify the records[43] and that the entries be prepared by an employee of the business that maintains the record.[44] It is highly unlikely, however, that the supreme

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[38]*See* J. TANFORD & R. QUINLAN, *supra* note 22, § 19.3, at 95-96.

[39]Darnell v. State, 435 N.E.2d 250, 253 (Ind. 1982) (person in charge of record keeping may authenticate business records prepared by other employees); Hebel v. Conrail, Inc., 444 N.E.2d 870, 877-78 (Ind. Ct. App. 1983) ("custodian of business records may identify them at trial"; "person making the record must be under direct supervision and control of the supervisor identifying the documents"). The basic rule is repeated in the text only because some confusion seems to exist in the secondary literature over who can be called as the authenticating witness. *See* M. SEIDMAN, *supra* note 22, at 135 (records may be authenticated by any witness having knowledge of the recordkeeping process; no citations).

[40]439 N.E.2d 1140 (Ind. 1982).

[41]The opinion does not state where the fingerprint cards originated. This information was obtained from R. Robinson, the defense attorney, by telephone on June 8, 1983.

[42]439 N.E.2d at 1142.

[43]*See* Morris v. State, 406 N.E.2d 1187 (Ind. 1980); Brandon v. State, 396 N.E.2d 365 (Ind. 1979); Crosson v. State, 268 Ind. 511, 376 N.E.2d 1136 (1978); Jones v. State 267 Ind. 205, 369 N.E.2d 418 (1977); Burger Man, Inc. v. Jordan Paper Prod., Inc., 170 Ind. App. 295, 352 N.E.2d 821 (1976); American United Life Ins. Co. v. Peffley, 158 Ind. App. 29, 301 N.E.2d 651 (1973). *But cf.* Myers v. State, 422 N.E.2d 745 (Ind. Ct. App. 1981) (identifying witness was not supervisor). While many of these cases require the supervisor under whose direction the records are "kept," this phrase means more than mere mechanical storage of records. The very heart of the business records exception is that documents must be records both prepared and maintained by a business in the course of regularly conducted activities. *See* C. MCCORMICK, *supra* note 10, § 310, at 725-27.

[44]Morris v. State, 406 N.E.2d 1187 (Ind. 1980); Brandon v. State, 396 N.E.2d 365 (Ind. 1979); Crosson v. State, 268 Ind. 511, 376 N.E.2d 1136 (1978); Jones v. State, 267 Ind. 205, 369 N.E.2d 418 (1977); Wells v. State, 254 Ind. 608, 261 N.E.2d 865 (1970); American United Life Ins. Co. v. Peffley, 158 Ind. App. 29, 301 N.E.2d 651 (1973). Many

court intended to allow records prepared by one business to be admissible as the business records of a different business. From the perfunctory opinion in *Pitts*, it appears that this issue was not raised by the defense attorney, and that the supreme court only intended to dispose of the meritless argument that the records should be excluded because their sponsor lacked personal knowledge. Although the result sanctioned is incompatible with prior law, it is doubtful that the supreme court intended a major change away from the common law in a sparse opinion which is nearly devoid of discussion and that cites only one prior case.[45]

4. Excited Utterances.—To qualify under the excited utterance exception to the hearsay rule, a declaration must be made in spontaneous response to a startling event. The event must be exciting enough to overcome the reflective faculties of the declarant, and the statement must be made sufficiently contemporaneous with the event, before the excitement wears off, so that there is not time for calm reflection.[46] No fixed time limit has been set by the courts, but the more time that has elapsed between the event and the making of the statement, the less likely it is to qualify as an excited utterance. Prior Indiana decisions have uniformly held that statements made more than a few minutes after a startling event do not qualify.[47] Indeed, the longest interval allowed before 1982 was fifteen minutes.[48]

During the survey period, however, this time limit was extended significantly. In *Gye v. State*,[49] the supreme court affirmed the trial court's admission of a statement as an excited utterance when the statement was made approximately forty-five minutes after the startling event. In this case, the person making the statement was the victim of a stabbing. The victim stopped a car soon after she was attacked and was driven to the hospital. The trip took about forty minutes. At the hospital, the emergency

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of these cases state that the entrant must have a duty to record information. This phrase does not mean just any duty, but a business duty owed by an employee to his or her employer. *See* C. McCormick, *supra* note 10, § 310, at 726-27.

[45]*See supra* text accompanying note 3.

[46]J. Tanford & R. Quinlan, *supra* note 22, § 28.3, at 135-36. Additional foundation requirements include: (1) the declarant was a participant in or an observer of the event; (2) the declaration related to the exciting event, explaining or elucidating it; (3) the declaration was a statement of fact, not opinion; and (4) the statement was made voluntarily. *Id.* (citations omitted).

[47]*See* Reburn v. State, 421 N.E.2d 604 (Ind. 1981) (three hours); Ketcham v. State, 240 Ind. 107, 162 N.E.2d 247 (1959) (two hours); Pittsburgh, C. & S.L. Ry. v. Wright, 80 Ind. 182 (1881) (thirty minutes); State v. Dutton, 405 N.E.2d 560 (Ind. App. 1980) (ten minutes); Cauldwell, Inc. v. Patterson, 133 Ind. App. 138, 177 N.E.2d 490 (1961) (one hour).

[48]Block v. State, 265 Ind. 569, 356 N.E.2d 683 (1976) (rape victim drove fifteen minutes to sister's home and immediately made statement). *Cf.* Choctaw v. State, 270 Ind. 545, 387 N.E.2d 1305 (1979) (court admitted as an excited utterance a statement made by a rape victim to the first police officer to arrive at her home, stating that the declaration was made within an hour of the attack, without being more specific about exactly how much time had elapsed).

[49]441 N.E.2d 436 (Ind. 1982).

room physician asked her what happened, and she told him she had been in a fight with her husband. The court ruled that despite the lapse of time and the fact that it was made in response to questions, her statement qualified as an excited utterance:[50]

> The length of elapsed time between when the declarations were uttered and when the occurrence took place is only one element to be considered in determining their spontaneity. Similarly, that the statements were made in response to inquiries is also only one factor to be considered.
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> . . . [Decedent's] condition rapidly deteriorated at the hospital and decedent constantly asked if she were going to die. The facts and circumstances demonstrate that the excitement from decedent's injuries and attendant pain, continued and controlled her thoughts and actions from the moment that the wounds were inflicted until she expired. Whether a statement is to be admitted as an excited utterance is a matter within the discretion of the trial judge and here we find no abuse of that discretion.[51]

The ruling in *Gye* appears to bring Indiana into line with other jurisdictions that follow the modern trend regarding excited utterances.[52] This hearsay exception has evolved from permitting only spontaneous exclamations made contemporaneously with the startling event, to include all utterances made while in an excited state of mind. Older cases referred to the exception as "res gestae" or "spontaneous exclamations," and tended to require literal spontaneity; only declarations made contemporaneous with or immediately after a startling event were admitted under the exception.[53] The modern trend, exemplified by the Federal Rules of Evidence,[54] is to call the exception "excited utterances," and shift the focus of the inquiry from spontaneity to whether the statement was made while the declarant was still under the stress and excitement of the event, regardless of the time that has elapsed. In other jurisdictions, statements made as long as fourteen hours after the startling event have been held to qualify as excited utterances if there is evidence the declarant was still in an excited mental state.[55] It is probable, however, that as the elapsed

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[50] *Id.* at 438.

[51] *Id.* (citations omitted).

[52] Although the language of the opinion indicates that the court has shifted its focus, the court also stated that any error in admitting the statement the victim made to the doctor was harmless because the statement was only cumulative of other evidence.

[53] *See, e.g.*, Daywitt v. Daywitt, 63 Ind. App. 444, 114 N.E. 694 (1917).

[54] *See* FED. R. EVID. 803(2) (statements made while "under the stress of excitement caused by the event or condition").

[55] *See* State v. Stafford, 237 Iowa 780, 23 N.W.2d 832 (1946); *see also* United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980) (statement by a child one hour after assault admissible); United States v. Nick, 604 F.2d 1199 (9th Cir. 1979) (statement by child a few

time between the event and the declaration increases, stronger evidence will be needed to prove that the declarant was still in a state of excitement.

C. *Evidence of Prior Criminal Activity*

Evidence that a criminal defendant has committed crimes other than the one charged generally is not admissible.[56] Once a jury hears that a defendant has a criminal record, especially if the defendant has been convicted for similar crimes, it is more likely to convict him or her.[57] Indiana courts have long recognized that there is an automatic unfavorable reaction in a juror's mind upon discovering that the defendant has a prior record, which makes such evidence presumptively inadmissible because of its highly prejudicial effect.[58] Neverthless, if evidence of prior criminal activity has some substantial probative value on an issue other than the defendant's general criminality, it may be admissible. This general exception is applied in many common situations. Evidence of other crimes may be admissible to show knowledge, intent, or malice, to impeach credibility, to establish motive when one crime is committed to cover an earlier crime, or to prove the identity of the defendant.[59] One common use of such evidence is to prove the identity of the defendant as the perpetrator of the crime by establishing a common scheme or plan.[60]

The exception to the rule that evidence of prior criminal activity is not admissible may be the most misunderstood doctrine of evidence. Too often, the inquiry into admissibility begins and ends with the attaching of a convenient label. There is a tendency on the part of courts and at-

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hours after assault admissible); Wallace v. State, 151 Ga. App. 171, 259 S.E.2d 172 (1979) (statements one to two hours after the event admissible).

[56]*E.g.*, Malone v. State, 441 N.E.2d 1339, 1345-46 (Ind. 1982); Watts v. State, 229 Ind. 80, 102-04, 95 N.E.2d 570, 579-80 (1950).

[57]*See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY 160 (1966). In an informal experiment conducted by the author of this Survey Article, students in evidence classes at Indiana University School of Law—Bloomington were asked to decide the guilt or innocence of a defendant based on a summary of the evidence for and against him. With all other facts being identical, the conviction rate jumped from 15% to 45% when students were told that the defendant had a prior record of similar criminal activity.

[58]*See, e.g.*, Malone v. State, 441 N.E.2d 1339, 1345-46 (Ind. 1982); Blue v. State, 250 Ind. 249, 235 N.E.2d 471 (1968); Vaughn v. State, 215 Ind. 142, 19 N.E.2d 239 (1939).

[59]*See* J. TANFORD & R. QUINLAN, *supra* note 22, § 44.7, at 220-21 and cases cited therein.

[60]The Indiana Supreme Court discussed the reason for allowing the use of evidence of prior criminal activity to show a common plan or scheme in Malone v. State, 441 N.E.2d 1339 (Ind. 1982):

> The operative rationale is that if an accused is known to have committed a crime in a particularly distinctive way, then that accused can probatively be considered as having committed another similar crime if the similar crime was also committed in the same particularly distinct way. . . . [T]his Court requires a strong showing that the different criminal actions were so similarly conducted that the method of conduct can be considered akin to the accused's "signature."

Id. at 1346.

torneys to assume that evidence of other crimes is automatically admissible once it has been characterized as evidence of a common scheme or plan, identification, intent, and so forth.[61] The failure to rigorously analyze the underlying relevancy of the evidence often leads to the admission of evidence of prior criminal activity on issues that are not actually contested. This amounts to allowing evidence with very low probative value despite its highly prejudicial effect.

The proper balancing of the probative value of evidence of prior criminal activity against its prejudicial effect was illustrated by a series of cases decided during the survey period. The most thorough discussion of the problem is found in *Malone v. State*.[62] Malone was charged with rape but claimed that the victim consented. The State offered evidence that Malone had raped another woman six weeks after the incident that was the basis of the charge in this case. The supreme court reversed Malone's conviction on the ground that evidence of the other rape had little probative value and was highly prejudicial.[63] The court stated:

> To indiscriminately admit proof of criminal activity beyond that specifically charged may compel a defendant to meet accusations without notice and may effectively negate the due process and presumption of innocence which our system of justice accords to every accused. Moreover, the admissibility of such evidence may raise collateral issues which confuse the jury or divert its attention from the actual charges before it.[64]

The court noted that there are exceptions such as the use of such evidence to prove intent, motive, or common scheme or plan. However, pigeonholing the evidence into one of those categories does *not* make it automatically admissible. The court explained:

> To be admissible according to any one of these exceptions, however, *the evidence must possess substantial probative value* [and be so] specifically and significantly related to the charged crime in time, place and circumstance as to be logically relevant to one of the particular excepted purposes.[65]

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[61] *See, e.g.*, Karlson, *supra* note 11, at 196-99 (evidence of common scheme allowed to prove that defendant is a professional criminal without any showing of particular relevancy).

[62] 441 N.E.2d 1339 (Ind. 1982).

[63] *Id.* at 1348.

[64] *Id.* at 1346 (citations omitted).

[65] *Id.* (emphasis added) (citations omitted). The court used common scheme or plan as an illustration:

> For instance, evidence of other criminal activity is commonly allowed to prove the identification of an accused according to the common scheme or plan exception. . . . Notwithstanding, if the identification of an accused can be proved by other evidence or if an accused's identity is not a material issue, then the admission of evidence of other criminal activity is improper to establish identity.

Id. (citations omitted).

The court held because the only real issue in *Malone* was the victim's consent—the defendant admitted the sexual intercourse—there was no material issue on which the evidence of the prior rape could be admitted. The court noted that "[t]he fact that one woman was raped has no tendency to prove that another woman did not consent."[66]

The requirement that evidence of other crimes have particular relevancy before it is admissible can be further illustrated by comparing two recent cases involving the admissibility of "mug shot" photographs of the defendant. In *Miller v. State*,[67] the supreme court reversed a rape conviction because the State was allowed to introduce mug shot photographs that suggested the defendant had a prior criminal record. In *Smith v. State*,[68] the court affirmed a conviction despite the State's use of mug shot photographs. The difference in result is explained by the fact that in *Smith* the mug shots had particular relevancy on a contested issue, while in *Miller* they did not.

In *Smith*, the defendant asserted an alibi defense and questioned the victim's opportunity to observe, and subsequently identify, his assailant. Under those circumstances, the court held that it was proper for the State to introduce the mug shot and prove the victim had been able to identify the photograph in a photo array "to rebut the defendant's challenge to the reliability of the victim's in-court identification."[69] The identity of the assailant was a central, material issue, and the victim's ability to identify the mug shot was of particular relevancy. In *Miller*, the rape victim identified her assailant by selecting a mug shot photograph of the defendant from a photo array. The photograph was subsequently introduced at trial on the issue of identity. In contrast to *Smith*, however, the defendant's identity was admitted in the opening statement and the only genuinely contested issue was consent. Therefore, the court found that the photograph had no evidentiary value because identification was not a contested issue.[70]

The supreme court's decision in *Jackson v. State*[71] also demonstrated that evidence of prior criminal activity is admissible if particularly relevant to a contested issue. In *Jackson*, the State alleged that the defendant robbed and shot a cab driver, and that his accomplice drove a getaway car. The defendant claimed *he* drove the car and the accomplice pulled the trigger. Thus, the identity of the shooter was in issue.[72] The trial court

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[66]*Id.* at 1347.

[67]436 N.E.2d 1113 (Ind. 1982).

[68]445 N.E.2d 85 (Ind. 1983).

[69]*Id.* at 87 (citation omitted).

[70]436 N.E.2d at 1120.

[71]446 N.E.2d 344 (Ind. 1983).

[72]Arguably, because the accomplice was equally guilty of murder as an accessory, *id.* at 346 (citations omitted), it made no *legal* difference who actually pulled the trigger. Nevertheless, because the question could have affected the jury's willingness to find the defend-

allowed the State to introduce evidence of a similar crime committed by the defendant to prove that the defendant was the shooter in the instant case. In the prior crime, the victim positively identified the defendant as the shooter, and the defendant admitted that he, not the accomplice, pulled the trigger. The supreme court, after lengthy analysis, found the two crimes "sufficiently similar to constitute Appellant's criminal 'signature' ".[73] Therefore, evidence of the other crime was admissible to show a common scheme or plan because it was relevant to a contested issue. Although the court did not articulate its reasons for finding relevancy, they are clear from the nature of the case; the prior crime was relevant evidence on the contested issue of whether the defendant shot the cab driver in the second crime.[74]

D. Expert Testimony—"Reasonable Medical Certainty"

In *Noblesville Casting Division of TRW v. Prince*,[75] the Indiana Supreme Court held that medical experts are not restricted to giving opinions that can be stated with reasonable medical certainty.[76] The justices

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ant guilty and easily could have affected sentencing, the question of the identity of the shooter was a legitimate material issue.

[73]*Id.* at 347.

[74]*See generally* J. TANFORD & R. QUINLAN, *supra* note 22, § 44.7, at 220-21 (to use common scheme or plan to prove identity, the other crimes must be similar, the manner of committing them must be so distinctive as to constitute a "signature," and the evidence must positively connect the defendant to the other crime). *See also* C. MCCORMICK, *supra* note 10, § 190, at 448-49.

Given this consistent requirement that evidence of prior crimes is only admissible if it has some specific relevancy, the courts' approach in "drug peddling" cases, such as Downer v. State, 429 N.E.2d 953 (Ind. 1982), is troublesome. *See also* Manuel v. State, 267 Ind. 436, 370 N.E.2d 904 (1977); Ingle v. State, 176 Ind. App. 695, 377 N.E.2d 885 (1978); Miller v. State, 167 Ind. App. 271, 338 N.E.2d 733 (1975). In *Downer*, the court admitted evidence of the defendant's five years of prior drug dealings "to show a common scheme or plan [on defendant's part] to engage in drug peddling." 429 N.E.2d at 955. The court, however, gave no explanation of how this was relevant to a contested issue. It is well settled that evidence of other crimes is not admissible merely to show the defendant's tendency to commit certain types of crimes, *Manuel*, 267 Ind. at 438, 370 N.E.2d at 905-06 (and cases cited therein), yet allowing prior drug crimes to show the defendant to be a drug dealer seems to do no more than show his tendency to commit drug offenses. One commentator has suggested that common scheme or plan evidence may always be used to show that the crime charged is part of a larger scheme, Karlson, *supra* note 11, at 198, but does not explain what relevancy such evidence has. Proving that the defendant has a lengthy criminal history can only confuse the issues, increase the juror's willingness to convict the defendant for past actions, and allow the prosecution to bootstrap a weak case. Occasional cases like *Downer*, in which the legitimate evidence against the defendant was strong, and the issue of the materiality of prior crimes was not discussed, probably should be viewed as harmless error cases, and not read as a judicial blank check to allow the State to prove the defendant's tendency to commit certain crimes. *See* C. MCCORMICK, *supra* note 10, § 190, at 448-49. *See supra* text accompanying note 3.

[75]438 N.E.2d 722 (Ind. 1982).

[76]*Id.* at 726.

held that opinions stated only in terms of probabilities and even possibilities have some probative value and are admissible, but the court could not decide what minimum standard to establish. The case is unusual because the court split two to two on the issue, with one justice not participating.[77] In both opinions, however, the justices agreed that prior case law requiring medical testimony to be phrased in terms of reasonable medical certainty should be overruled. Thus the case clearly abrogates the reasonable-medical-certainty standard, but fails to replace it with anything because of the absence of a majority. Justice Hunter, who wrote the opinion for the court stated: "We here reject the notion that the admissibility and probative value of medical testimony is dependent upon the expert witness's ability to state conclusions in terms of reasonable medical certainty; lacking a clear majority here, our specific language in *Palace Bar* to the contrary should nonetheless be overruled."[78]

In the 1978 case of *Palace Bar v. Fearnot*,[79] the plaintiff sued for the wrongful death of her husband who had fallen down stairs at the Palace Bar. On the question of causation, however, the coroner and expert pathologist both testified that the decedent died of natural causes, and not as a result of the fall.[80] The pathologist did testify that it was *possible* the decedent died of a heart attack, and *possible* for a heart attack to be triggered by a fall, but he cautioned that there would be no way to prove it. Despite the absence of testimony establishing causation, a verdict was entered for the plaintiff.

The supreme court reversed, pointing out that the plaintiff had the burden of proof on proximate cause, and that there was a total absence of evidence on that issue. The only evidence on the subject showed that the decedent died of natural causes. In referring to the pathologist's speculation about the possiblity of a trauma-induced heart attack, a unanimous court held:

> A doctor's testimony can only be considered evidence when he states that the conclusion he gives is based on reasonable medical certainty that a fact is true or untrue. A doctor's testimony that a certain thing is *possible* is no evidence at all. His opinion as to what is possible is no more valid than the jury's own speculation . . . .[81]

From the nature of the case, it is clear the court was not attempting to define a general standard for the admissibility of expert opinions.

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[77]Justice Hunter, joined by Justice Prentice, wrote the opinion of the court. Justice Pivarnik wrote a concurring opinion joined by Chief Justice Givan. Justice DeBruler did not participate.

[78]438 N.E.2d at 726.

[79]269 Ind. 405, 381 N.E.2d 858 (1978).

[80]The coroner stated the cause of death was a cerebral hemorrhage, and the pathologist found the decedent died as a result of heart disease. *Id.* at 407, 381 N.E.2d at 860.

[81]*Id.* at 415, 381 N.E.2d at 864.

Rather, it was making the point that when an expert testifies that in his opinion a result was caused by one thing, and also testifies that a second cause is possible but not likely, his testimony will not support a verdict based on that second cause. The statement about reasonable medical certainty, then, probably was not intended to be taken literally or as a general standard.

In *Noblesville Casting*, the medical expert similarly testified in terms of possibilities rather than medical certainty. However, the testimony was much stronger than that given in *Palace Bar*. When questioned about causation, plaintiff's medical expert stated that the aggravation of a pre-exiting injury *could have* been caused by external trauma and that it was *possible* to reinjure one's back in the manner plaintiff claimed,[82] language similar to that used by the expert in *Palace Bar*. There was, however an important difference in the testimony: in *Palace Bar*, the expert clearly stated that another cause was more likely, but in *Noblesville Casting*, the "possible" cause was itself the most likely. All four justices agreed that this testimony was properly admitted even though not phrased in terms of reasonable medical certainity,[83] thus rejecting the strict semantic approach implied by the language in *Palace Bar*.

The two opinions in *Noblesville Casting* diverge on the question of how to define the relevancy standard for expert testimony. Justice Hunter would eschew a precise standard and decide on a case-by-case basis whether the expert's testimony had probative value.[84] Hunter would let the expert testify as he sees fit because questioning and cross-examination about the degree of certainty will give the jury enough information to accept or reject the expert's opinion.[85] This approach clearly would allow experts to discuss possibilities as well as probable and certain results.

Justice Pivarnik concurred in the result because he disagreed with Hunter's view concerning the value of expert testimony based only on "possibilities."[86] Pivarnik would require that opinions be based at least on probabilities; mere possibilities are too speculative to have probative value.[87] Justice Pivarnik found that:

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[82]438 N.E.2d at 726.

[83]*Compare supra* text accompanying note 78 *with* 438 N.E.2d at 738 (Pivarnik, J., concurring).

[84]*Id.* at 731.

[85]Justice Hunter stated that:

> [T]o hinge the question whether an expert's opinion is admissible and probative on the willingness . . . to say that such-and-such is "reasonably certain," as opposed to "probable" or "possible," is to impose on the expert a question which elevates the law's demand for certainty in language over the state of the particular art
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> . . . .

Id. at 727. As Justice Hunter's numerous citations indicate, this approach is followed in many other jurisdictions and represents the modern trend. *See id.* at 727-29, and cases cited therein.

[86]438 N.E.2d at 737 (Pivarnik, J., concurring).

[87]*Id.* at 737-38.

> [E]vidence which speaks only to possibilities [cannot] be admissible as probative evidence, regardless of the status of the witness giving it . . . . It is impossible for every expert witness to testify with certainty that a given scientific fact or result is apparent. But by applying his experience in the field and the analytical processes to which he testifies, his certainty must be of such a degree that it is more than a bare possibility.[88]

An analysis of the two opinions lead to the conclusion that the distinction between them is more semantic than real. Justice Hunter's opinion concedes that an expert's opinion based on mere possibilities—an opinion that lacks reasonable certainty or probability—is not sufficient evidence to support a verdict, although it is admissible as having some probative value.[89] The concurrence was primarily concerned with the issue of what kind of testimony will support a verdict. The concurring justices probably would have to admit that once one expert testifies that a particular conclusion is probable, a rebuttal expert could be called to testify that the state of the art refutes such a statement and that a series of conclusions are equally possible. In fact, the concurrence approves the testimony actually given in *Noblesville Casting*, which consisted of the expert's testimony about possibilities.[90] Thus, it is likely that testimony as to possibilities is relevant once there is a legitimate issue about whether one of the possibilities is more likely than the others.[91] The plaintiff, however, must offer some evidence that a particular result is the most probable to sustain a verdict.

E. Previously Hypnotized Witnesses

Whether to allow the testimony of a witness who was hypnotized before trial is an issue currently being debated in many jurisdictions.[92] Witnesses are often able to remember extraordinary details about crimes when under hypnosis, and police departments are increasingly resorting to this technique as an investigative tool. Medical authorities, however, caution that there is a dangerous potential for abuse when hypnotically enhanced memory is used as the basis for courtroom testimony. Hypnotically recalled testimony can be a mixture of fact and fantasy based

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[88] *Id.*

[89] *Id.* at 731.

[90] *Id.* at 738 (Pivarnik, J., concurring).

[91] *See* Jones v. State, 425 N.E.2d 128 (Ind. 1981) (court approved testimony based on neutron activation analysis evidence that bullet "could have come" from certain box of ammunition); Herman v. Ferrell, 150 Ind. App. 384, 276 N.E.2d 858 (1971) (speculative medical testimony admissible); Magazine v. Shull, 116 Ind. App. 79, 60 N.E.2d 611 (1945) (medical experts may use words like "might," "could," and "possible").

[92] *See, e.g.*, cases cited *infra* notes 93-96. For a further discussion of the use of hypnotized witnesses, see Johnson, *Criminal Law and Procedure, 1983 Survey of Recent Developments in Indiana Law*, 17 IND. L. REV. 115, 167 (1984).

on suggestive words or cues used by the hypnotist, and neither the expert nor the subject may be able to distinguish between them. A person under hypnosis may unconsciously create answers if he or she cannot recall the details being sought, a process called "confabulation." A hypnotized individual not only is easily influenced, but also is highly motivated to please the hypnotist. Most importantly, once a person has awakened from a hypnotic trance, he or she usually will be confident that everything in his or her memory—both fact and hypnotically induced fantasy—is factually based, and this conviction cannot be undermined through cross-examination.[93]

Courts faced with an objection to the testimony of a previously hypnotized witness must undertake a difficult balancing of the legitimate investigative needs of the police against the danger of inaccurate trial testimony resulting from suggestion. Although no consensus has yet been reached, the majority of jurisdictions either prohibit hypnotically induced testimony altogether,[94] or allow it only if certain safeguards against undue suggestion are followed.[95] A few courts have held that hypnotically refreshed testimony is always admissible, and that its inherent problems and the possibility of suggestion go to the weight and credibility, not to the admissibility of the testimony.[96]

During the survey period, the Indiana Supreme Court decided five cases concerning the testimony of previously hypnotized witnesses. Considered together, these cases establish fairly clear guidelines for the admissibility of testimony influenced by hypnosis. Indiana, for the most part, has taken the minority position that such testimony is admissible, and that the possibility that the witness' memory has been altered by suggestive procedures goes only to its weight. There is one clear exception: any evidence derived for the *first time* during a hypnotic session is *per se* inadmissible.

The first hypnosis case, *Strong v. State*,[97] concerned the admissibility of identification evidence. An eyewitness to a robbery-murder was hyp-

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[93]*See* Pearson v. State, 441 N.E.2d 468, 471-72 (Ind. 1982). *See generally* D. CHEEK & L. LECRON, CLINICAL HYPNOTHERAPY 13 (1968); Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 CALIF. L. REV. 313 (1980); Levitt, *The Use of Hypnosis to "Freshen" the Memory of Witnesses or Victims*, 17 TRIAL 56 (Apr. 1981); Note, *Hypnotically Induced Testimony: Credibility versus Admissibility,* 57 IND. L.J. 349 (1982).

[94]*See* Pearson v. State, 441 N.E.2d 468, 472 (Ind. 1982), and cases cited therein.

[95]The leading case is State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981), in which the court required the following safeguards suggested by experts in hypnosis: (1) that the session be conducted by an impartial, experienced psychiatrist or psychologist, not regularly employed by the police; (2) that the witness give a detailed narrative statement before being hypnotized; (3) that the entire session be recorded; and (4) that no police be present during the session. *See also* Pearson v. State, 441 N.E.2d 468, 472 (Ind. 1982), and cases cited therein.

[96]*See* Pearson v. State, 441 N.E.2d 468, 472 (Ind. 1982), and cases cited therein.

[97]435 N.E.2d 969 (Ind. 1982). Before *Strong*, the supreme court had heard only two cases involving previously hypnotized witnesses. In both, the defendant had waived any

notized by a police officer, and a composite drawing of the killer was made from the description the witness gave while in a hynotic trance. The drawing was admitted at trial, and the defendant appealed. The court adopted the majority position, holding that evidence obtained for the first time from a witness while he or she is in a hypnotic trance "is inherently unreliable and should, therefore be excluded as having no probative value."[98] The court also noted that evidence produced during a hynotic trance "is not susceptible of cross-examination and should be excluded for this reason alone."[99]

The defendant also objected to the witness's in-court identification on the grounds that the hypnosis was impermissibly suggestive. The court did not look at hypnosis cases from other jurisdictions, but rather, followed the reasoning in suggestive line-up cases, requiring only that the State show by "clear and convincing evidence, that the in-court identification of the defendant has a factual basis independent of the hypnotic session."[100] In upholding the admissibility of the in-court identification despite the police-conducted hypnosis, the court impliedly rejected the majority positions that hypnotically influenced testimony is either *per se* inadmissible, or inadmissible unless carefully safeguarded against police influence. Without even mentioning the possibility of requiring safeguards, the court found that because the witness had a good opportunity to view the killer and had picked his photograph out of a mug book *before* being hypnotized, there was a sufficient factual basis, independent of the hypnotic session, for the in-court identification. The court held that any possible changes in the witness' testimony caused by suggestive hypnosis "are matters which go to the weight to be given her testimony and not to its admissibility."[101]

Four months later, the supreme court decided the second hypnosis case, *Forrester v. State*.[102] This time, the testimony objected to concerned the corpus delicti of the crime rather than the identification of the accused. In *Forrester*, the victim of a rape had been hypnotized before trial.[103] The defendant objected claiming that the victim was therefore incompetent to testify at all. The supreme court rejected this argument, holding that the victim was competent to testify "with respect to necessary and relevant evidence of the corpus delicti of the charged offenses; which

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claim of error by failing to object. Pavone v. State, 402 N.E.2d 976 (Ind. 1980); Merrifield v. State, 400 N.E.2d 146 (Ind. 1980).

[98]435 N.E.2d at 970 (citations omitted). The court cited thirteen cases from ten jurisdictions in support of this position. *Id.*

[99]*Id.*

[100]*Id.* at 970-71 (citations omitted). The court cited Manson v. Brathwaite, 432 U.S. 98 (1977) and Morgan v. State, 400 N.E.2d 111 (Ind. 1980) for the due process requirements for in-court identifications.

[101]435 N.E.2d at 971 (citing Willis v. State, 411 N.E.2d 696, 700 (Ind. Ct. App. 1980)).

[102]440 N.E.2d 475 (Ind. 1982).

[103]The opinion does not state whether she was hypnotized by the police, as in *Strong*, or by an independent expert as required in the safeguards discussed in note 95, *supra*.

evidence the prosecutrix had already provided to the police before the hypnotic session."[104] The victim was therefore properly allowed to relate the incident during her testimony. The court's opinion suggests that it might not have permitted the victim to identify the accused in court because the identification might have been solely the product of the hypnotic session; however, the court did not decide this issue because the defendant did not raise it. Thus, *Forrester* reaffirms two principles stated in *Strong:* evidence derived from a hypnotic session will be excluded, but hypnotically influenced testimony will be admitted if consistent with statements the witness made before being hypnotized. *Forrester* also implies that hypnotically influenced testimony concerning the elements of the offense may be more readily allowed than hypnotically influenced identification testimony.

Pearson v. State,[105] the third hypnosis case, was decided one month after *Forrester*. This case presents the supreme court's most thorough treatment of the issue. In *Pearson*, a rape victim was hypnotized by a police officer after she had given a statement, but before trial. The trial court overruled the defendant's pretrial motion to suppress the victim's entire testimony because her memory had been contaminated and altered by the hypnosis. The supreme court for the first time reviewed at length the dangers of hypnosis and the cases from other jurisdictions excluding hypnotically influenced testimony or requiring stringent safeguards. Nevertheless, relying on *Strong* and *Forrester*, the court explicity rejected the majority position, holding that the fact of hypnosis "should be a matter of weight with the trier of fact but not a *per se* disqualification of the witness."[106]

The court in *Pearson* does appear to create one foundation requirement for the admission of hypnotically influenced testimony—the witness may only testify concerning matters about which he or she made pre-hypnosis statements.[107] Otherwise, the offeror will not be able to comply with the court's requirement that:

> In every case the trier of fact must be presented with sufficient evidence to be able to judge the reliability of the witness's perception of the events *before* the hypnosis session, the manner in which the hypnosis procedure was conducted, and the degree to which the witness's statements were changed by the hypnosis session.[108]

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[104]440 N.E.2d at 481.

[105]441 N.E.2d 468 (Ind. 1982).

[106]*Id.* at 473. The court suggested that "the careful attorney" will want to follow the safeguards mentioned in note 95, *supra*, but did not require these safeguards as foundation elements. 441 N.E.2d at 473. The court also stated that *no* special instruction on evaluating the credibility of a hypnotized witness may be given. "[I]t is erroneous to give an instruction which singles out one witness's testimony and attacks its credibility." *Id.* at 475.

[107]441 N.E.2d at 473.

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

In *Pearson*, the victim had positively identified the defendant as her assailant and described the corpus delicti of the offense before being hypnotized. She was then hypnotized in what the court admitted was a "very unreliable" session.[109] Nevertheless, the court explicitly held that she was a competent witness both as to the identification of the accused and as to the necessary elements of the corpus delicti. This holding impliedly rejects any notion that identification testimony might be treated differently than corpus delicti testimony.

In *Stewart v. State*,[110] the final hypnosis case, a witness made a statement about a shooting after he was hypnotized by a police officer. The witness testified that he remembered nothing new about the crime after the session.[111] The supreme court rejected a challenge that the witness was incompetent to testify at all because of the hypnosis. The issue was given little attention because the defendant had waived it.[112] Nevertheless, the court stated in dictum that a witness can testify after hypnosis about the corpus delicti of a crime if he provided such information before the hypnotic session.[113] The opinion refers back to the tantalizing suggestion in *Forrester* that hypnotically refreshed testimony about the elements of the crime may be treated differently than hypnotically aided identification testimony.[114]

Peterson v. State[115] is the most recent Indiana Supreme Court decision concerning hypnosis. In *Peterson*, a witness to a murder related the incident to the police, but was not able to identify the perpetrators from a photo-array or line-up. The witness was subsequently hypnotized by a police officer in an effort to enhance his memory. After the hypnotic session, the witness identified a photograph of the defendant as the murderer. Over the defendant's strenuous objections,[116] the witness testified in court about the details of the murder and made an in-court identification of the defendant. The defendant was found guilty of murder and appealed.

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[109] *Id.* Apparently, none of the safeguards suggested in note 95, *supra*, were present.

[110] 442 N.E.2d 1026 (Ind. 1982).

[111] It is astounding that the supreme court could place any reliance on the witness' own statement that he remembered nothing new, when the court had itself noted only one month before that "[i]t is usually impossible for . . . the subject . . . to distinguish between the fact and fantasy even when the subject is brought out of the hypnotic trance." Pearson v. State, 441 N.E.2d 468, 471 (Ind. 1982).

[112] The defendant failed to raise the issue of the witness' competency to testify in his Belated Motion to Correct Errors. 442 N.E.2d at 1031.

[113] *Id.* (citing Forrester v. State, 440 N.E.2d 475 (Ind. 1982)).

[114] 442 N.E.2d at 1031. It is unlikely that the two kinds of testimony will in fact be treated differently. The court, in *Pearson*, the only case presenting a proper objection and both kinds of testimony, treated them the same.

[115] 448 N.E.2d 673 (Ind. 1983).

[116] The defendant's motion to suppress, motion in limine, and objection at trial were all overruled by the trial court. *Id.* at 674.

The supreme court reversed the defendant's conviction in an opinion that explored the merits and dangers of hypnosis at some length.[117] The court found that the witness' testimony about the facts of the crime was properly admitted but that the admission of his in-court identification of the defendant was reversible error.[118] The difference in treatment, however, was not based upon a distinction between hypnotically aided testimony about the corpus delicti of the crime and hypnotically aided identification testimony. Rather, the distinction was made because "there was an independent factual basis for [the witness'] general testimony with respect to the occurrence of [the] murder"[119] but the in-court identification was "the direct [result] of a hypnotic session."[120] Furthermore, the hypnotically aided in-court identification did not allow the defendant "to exercise his due process rights to confront and cross-examine."[121]

Justice Hunter wrote a separate concurring opinion in which he made an effort to clarify the supreme court's position on hypnotically aided testimony.[122] He stated that the Indiana position falls in between the "total exclusion" rule and the jurisdictions that allow all hypnotically aided testimony with the associated problems going to the weight of the evidence.[123]

Thus, the Indiana Supreme Court acknowledges the likelihood of confabulation, yet refuses to adopt realistic safeguards to protect the defendant. Experts stress that a reliable session can be conducted only by an impartial hypnotist with no police present,[124] yet Indiana will allow police

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[117]The majority opinion, however, only discussed one Indiana hypnosis case, Strong v. State, 435 N.E.2d 969 (Ind. 1982).

[118]448 N.E.2d at 678-79.

[119]*Id.* at 678.

[120]*Id.* at 675. The court compared the in-court identification to the composite drawing in *Strong*.

[121]*Id.* at 678. The court also discussed with apparent approval the defendant's argument that "hypnosis has not gained such general acceptance in the scientific community so as to constitute a reliable and legally valid procedure for enhancing memory." *Id.* at 674.

[122]*Id.* at 679 (Hunter, J., concurring).

[123]*Id.* (citations omitted). Justice Hunter delineated the court's position on the use of hypnotically aided testimony as:

> (1) the witness is not totally incompetent to testify and there will be no error when the witness testifies to what was remembered before the hypnosis; (2) any evidence derived from a witness while he or she is under hypnosis is inherently unreliable and must be excluded as having no probative value; (3) if evidence that is the product of a hypnosis session is admitted during trial, it will not be reversible error if the jury is aware of all the circumstances surrounding the hypnosis session and the degree to which the witness's statements were changed by the hypnosis, and if the changes in the witness's statements were not significant or did not relate to essential elements of the offense.

Id.

[124]*See* State v. Mack, 292 N.W.2d 264, 271 (Minn. 1980).

officers to hynotize a key witness.[125] Experts point out that the hypnotized subject will be unaware that his or her memory has been changed by suggestion, making cross-examination to expose alterations impossible,[126] yet Indiana will not require that the state make a record of what the subject was told during hypnosis. In short, the supreme court has required only one of the safeguards that experts think necessary: the subject must have given a prior statement on the facts before being hypnotized. The only hypnotically influenced testimony that will be excluded is information on a matter brought up for the first time during a hypnotic trance. New details about an issue previously mentioned are admissible; only a totally new topic will be excluded. This absence of safeguards, when taken in conjunction with the court's refusal to permit a special cautionary instruction regarding hypnotically influenced testimony,[127] may lead to the conviction of some defendants on the basis of false evidence that is the product of advertent or inadvertent suggestion implanted during hypnosis.

F. Breathalyzer Tests

In order for the results of a breathalyzer test to be admissible, the state must prove three foundation elements:

1. The test was administered by an operator certified by the department of toxicology [of the Indiana University School of Medicine];

2. The equipment used in the test was inspected and approved by the department of toxicology; and

3. The operator used techniques approved by the department of toxicology.[128]

In *Boothe v. State*,[129] the fourth district court of appeals interpreted the third foundation element as requiring the State to introduce a certified copy of the department of toxicology's approved procedures for conducting a breathalyzer test. In *Boothe*, the evidence at trial concerning the techniques used by the operator consisted of the following:

> Mr. Morrison: Officer Haverstock, is the routine procedure that you use in administering the test the same ones that were given you

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[125]*See, e.g.*, Stewart v. State, 442 N.E.2d 1026, 1031 (Ind. 1982); Pearson v. State, 441 N.E.2d 468, 470 (Ind. 1982).

[126]441 N.E.2d at 471.

[127]*Id.* at 475 (no special instruction singling out the credibility of one witness may be given).

[128]Klebs v. State, 159 Ind. App. 180, 183, 305 N.E.2d 781, 783 (1974).

[129]439 N.E.2d 708 (Ind. Ct. App. 1982).

> by the Department of Toxicology in their instructions . . .?
> Officer Haverstock: Yes, those were the procedures that I followed.[130]

The court held that the operator's conclusion that he followed approved procedures was not sufficient to satisfy this part of the foundation. Instead, the court required the State to first prove what the approved techniques are through introduction of a certified official document from the department of toxicology, and then prove that the operator complied with them.[131]

In reaching this conclusion, the court relied primarily on two earlier decisions which held that breathalyzer tests were inadmissible because of inadequate proof on this foundation element. In one, the operator described his own procedures, but "the record [was] devoid of *any* evidence to establish that the procedure described resembled the procedure approved by the department of toxicology."[132] In the other, the State showed a videotape depicting the operation of the test and the operator's techniques, but again "the record [was] devoid of *any* evidence establishing that the procedure utilized resembled the procedure approved by the Department."[133] Neither operator testified that he followed approved procedures. In neither case did the court indicate *how* the State must prove what the department of toxicology approved procedures are, nor did either opinion imply that the operator's testimony that he followed approved procedures would be insufficient. There is a significant difference between requiring *some* evidence and requiring a certified copy of the department document. Nevertheless, the opinion in *Boothe* demands that the State offer a certified copy of the document. An important question raised by the *Boothe* decision is whether other methods of establishing correct procedures, such as the operator's own testimony, calling an expert witness from the department of toxicology, or asking for judicial notice, are precluded.

Presumably, the *Boothe* holding means that the other two parts of the breathalyzer foundation also require the introduction of copies of the appropriate department of toxicology documents. The State will have to prove that the operator was certified through a copy of that certificate, and that the equipment was inspected and approved by copies of those

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[130]*Id.* at 711. Apparently, there are two department documents—one detailed and one a summary checklist. In Denman v. State, 432 N.E.2d 426, 430 (Ind. Ct. App. 1982), the court found that either could be used, although it is not clear whether this is still good law after *Boothe*.

[131]The document would be admissible as an official record of the State under Trial Rule 44, *see* J. TANFORD & R. QUINLAN, *supra* note 22, § 25.3, at 119-21, and under IND. CODE § 9-11-4-5(c) (Supp. 1983) (certified copies of such document are admissible and constitute prima facie evidence of the approved technique).

[132]Klebs v. State, 159 Ind. App. 180, 184, 305 N.E.2d 781, 784 (1974) (emphasis added).

[133]Hartman v. State, 401 N.E.2d 723, 725 (Ind. Ct. App. 1980) (emphasis added).

documents.[134] *Boothe* does not address these other foundation elements explicitly, and no previous case has made the introduction of department documents absolutely essential; however, the conclusion seems logically compelled. The controlling statute explicitly prohibits the admission of breathalyzer test results unless the test was performed by a certified operator with certified equipment and chemicals.[135] The statute makes no mention of exclusion for failure to follow approved procedures. If a strict foundation requirement is attached to an only *implicit* requirement, surely the *explicit* requirements will be no less strictly enforced.

Taken in toto, these requirements make the introduction of breathalyzer results curiously different from the introduction of the results of other kinds of scientific tests. The results of scientific tests generally will be admissible if the operator's own testimony establishes his or her training and competency.[136] Yet the implications of *Boothe* are that a breathalyzer operator may not simply testify to being certified, but must produce the certificate. The requirements that scientific machines be working properly and that proper procedures were followed can be established in the usual case by the operator's testimony, because he or she is the expert.[137] *Boothe* holds to the contrary for breathalyzer tests. A partial, if not a satisfactory, explanation for treating breathalyzer tests differently can be found in the Indiana Code which explicitly states that breathalyzer results are not admissible unless the operator and equipment were certified,[138] and in state administrative regulations that provide that the departmentally approved method "shall be followed."[139] There are no similar provisions for other kinds of scientific tests.

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[134]*Cf.* Denman v. State, 432 N.E.2d 426 (Ind. Ct. App. 1982). In *Denman*, the State offered into evidence the certification document for the equipment and chemicals, and the court admitted them over the defendant's hearsay objection pursuant to IND. CODE § 9-4-4.5-6(b) (1982) ("The certificate . . . is admissible as evidence"). That code section has been replaced by a new act to the same effect. Act of Apr. 19, 1983, Pub. L. No. 143-1983, § 1, 1983 Ind. Acts 989, 993 (codified at IND. CODE § 9-11-4-5(c) (Supp. 1983)).

[135]IND. CODE § 9-11-4-5(d) (Supp. 1983).

[136]A physician need not introduce a certified copy of his or her medical license to be qualified as an expert, but may testify that he or she is licensed.

[137]*See* Reid v. State, 267 Ind. 555, 375 N.E.2d 1149 (1978) (involving trace metal detection).

[138]IND. CODE § 9-11-4-5(a), (d) (Supp. 1983).

[139]260 IND. ADMIN. CODE § 1-3-1(2) (1979).