IX. Evidence

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A. HEARSAY

1. Statements Against Penal Interest.—The appeal of a convicted murderer in *Taggart v. State*[1] was denied as the Indiana Supreme Court reaffirmed the general inadmissibility of a hearsay statement against penal interest offered to exculpate a defendant in a criminal trial.[2] Evidence of this nature is admissible under *Taggart* only when its exclusion would violate the due process clause of the fourteenth amendment of the United States Constitution.[3] In *Taggart*, a third party, William McCall, had allegedly confessed to the murders. At a motion in limine hearing, the prosecution had obtained an order preventing the defense from offering any evidence concerning the alleged confession. The defendant offered to prove that the confession was typed by the defendant's son-in-law from an original provided by King Smith. Smith allegedly promised that McCall would sign the confession for $5,000 but would deny it if not paid.

The *Taggart* court is clearly correct in holding that exclusion of the alleged confession did not violate due process[4] in light of the Supreme Court decision of *Chambers v. Mississippi*.[5] *Chambers* was the first Supreme Court opinion to hold that the exclusion of a statement against penal interest may be a violation of due process. In *Chambers*, the defense sought to use statements made by the witness McDonald. When McDonald denied committing the crime charged against the defendant, the defense sought to offer evidence that McDonald had admitted on several occasions that he had committed the crime. He even had confessed to the defense counsel and then repudiated his confession. Moreover, an alibi offered by

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[1]382 N.E.2d 916 (Ind. 1978).

[2]*Id.* at 918. Statements against penal interest have traditionally been held inadmissible in Indiana. *See* Siple v. State, 154 Ind. 647, 57 N.E. 544 (1900); McGraw v. Horn, 134 Ind. App. 645, 183 N.E.2d 206 (1962).

[3]382 N.E.2d at 918.

[4]*Id.* at 917-18.

[5]410 U.S. 284, 302 (1973). Prior to *Chambers*, the only United States Supreme Court decision to directly consider the issue of a hearsay exception for statements against interest was Donnelly v. United States, 228 U.S. 243 (1913). In that opinion, with Justice Holmes dissenting, the Court held that the hearsay exception is limited to interests of a pecuniary or proprietary nature. *Accord*, Scolari v. United States, 406 F.2d 563 (9th Cir.), *cert. denied*, 395 U.S. 981 (1969).

McDonald was shown to be false, and evidence placed him near the scene of the crime. Due to Mississippi's voucher rule,[6] the defense was not permitted to question McDonald concerning the prior statements. The hearsay rule prevented witnesses who had heard McDonald's prior confessions from relating them to the jury. The Supreme Court, therefore, concluded that exclusion of McDonald's statements violated the defendant's due process because the statements against penal interest possessed substantial guarantees of reliability in this case.[7]

Relying on *Chambers*, the Indiana Supreme Court in *Taggart* affirmed the trial court's exclusion of McCall's statements. In *Taggart*, unlike *Chambers*, no evidence was offered tying McCall to the murders other than the alleged confession. Assuming that McCall had in fact made the confession, it is difficult to determine that the statement was against his interest because he expected to receive $5,000.[8] The supreme court concluded that the evidence lacked any guarantee of reliability.[9]

As the *Taggart* court correctly found, exclusion of a statement against penal interest that was made in an attempt to further the declarant's financial interest does not violate due process because such evidence does not possess any assurance of trustworthiness.[10] Resolution of the constitutionality of excluding the evidence offered by the defense in *Taggart*, however, does not foreclose consideration of the propriety of excluding statements against penal interest as hearsay, while admitting statements against proprietary or pecuniary interest as an exception to the hearsay rule.

Federal Rule of Evidence 804(b)(3) would prohibit the use of a statement against penal interest offered to exculpate an accused

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[6]Mississippi's party witness or voucher rule prohibits a party from cross-examining or impeaching his own witness. Clark v. Lansford, 191 So. 2d 123, 125 (Miss. 1966). Thus, Chambers was prevented from calling witnesses to discredit the reputation of McDonald, whom he had called as his own witness. Prior to trial, he had unsuccessfully attempted to have McDonald ruled a hostile witness. 410 U.S. at 295-98.

[7]410 U.S. at 302-03.

[8]Consider, however, Justice Holmes' dissent in Donnelly v. United States, 228 U.S. 243 (1913):

> The exception to the hearsay rule in the case of declarations against interest is well known; no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man . . . and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight.

Id. at 278 (Holmes, J., dissenting).

[9]382 N.E.2d at 919.

[10]*Id.*

"unless corroborating circumstances clearly indicate the trustworthiness of the statement."[11] This standard of admissibility has been stringently applied by courts in a number of cases to exclude declarations against penal interest.[12] Congress added the requirement of corroboration due to the danger of a trumped-up confession by a professional criminal.[13] The Florida Court of Appeals, in *Pitts v. State*,[14] quoted in *Taggart*, summarized the dangers of such evidence:

> "Although the rule announced may appear at first blush to be harsh it is, like the hearsay rule itself, the product of common sense. Were admissions of guilt made by a party unavailable at the trial to cross-examination, whether as a result of absence or refusal to testify, held to be admissible in evidence at the trial of an accused then a veritable daisy chain of extrajudicial 'confessions' would be the inevitable result. The case sub judice is an excellent example. Had the alleged statements of Adams, while he refused to take the stand as a witness and testify, been admitted into evidence and believed by the jury then appellants would have been acquitted, never again subject to jeopardy. Then upon Adams being tried for the crimes for which appellants would have been acquitted their confessions would have been admissible in the Adams' trial, resulting, if believed by the jury, in acquittal. Under such circumstances, which are the logical result and not strained fantasy, three persons would be acquitted of the crimes notwithstanding that each volun-

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[11]FED. R. EVID. 804(b)(3) provides the following hearsay exception:
Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[12]*See* United States v. Bagley, 537 F.2d 162 (5th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977); Lowery v. Maryland, 401 F. Supp. 604 (D. Md. 1975), *aff'd mem.*, 532 F.2d 750 (4th Cir. 1976), *cert. denied*, 429 U.S. 919 (1976).

[13]The requirement of corroboration for statements against penal interest offered to exculpate an accused at a criminal trial was added at the suggestion of Senator McClellan. Congress elaborated upon his suggestion, noting the special dangers of a trumped-up confession by a professional criminal or some person with a strong motive to lie. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[03], at 804-103 to -114 (1979) [hereinafter cited as J. WEINSTEIN].

[14]307 So. 2d 473 (Fla. Dist. Ct. App.), *cert. dismissed*, 423 U.S. 918 (1975), *quoted in* 382 N.E.2d at 918-19.

> tarily confessed thereto. What, one asks rhetorically, happens to the public and the victims of crimes under such circumstances?"[15]

In only one respect is the Florida Court of Appeals incorrect. A jury would not have to believe an extrajudicial confession by a person unavailable for cross-examination to acquit him. Because of the heavy burden of proof put on the prosecution in a criminal trial, it would merely be necessary for the jury to be unsure of the confession's falsity.

In light of the real danger of abuse, the Indiana Supreme Court in *Taggart* was correct in generally excluding statements against penal interest offered by a defendant in a criminal trial. However, the dangers that exist in criminal trials for evidence of this nature are not found in civil trials. If given the opportunity to consider the admissibility of a statement against penal interest offered as an exception to the hearsay rule at a civil trial, the Indiana Supreme Court should consider adopting a rule similar to Federal Rule of Evidence 804(b)(3), which would admit the evidence.[16]

2. Statements for Purposes of Medical Treatment.— Statements made to a treating physician concerning the cause of a physical illness were declared hearsay by the Indiana Supreme Court in *C.T.S. Corp. v. Schoulton.*[17] Manley Robinson had died as a result of acute liver and kidney failure. In an action brought for workmen's compensation benefits by Philip Schoulton, the administrator of Robinson's estate, the Industrial Board determined that his death was the result of inhalation of toxic fumes in the course and scope of employment. The court of appeals rejected C.T.S. Corporation's appeal from the award granted by the Industrial Board.[18] On appeal to the supreme court, the sole evidential issue was the existence of sufficient competent evidence to sustain

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[15]382 N.E.2d at 918-19 (quoting 307 So. 2d at 486).

[16]Indiana is in the definite minority in its total rejection of statements against penal interest. *See* People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 36 Cal. Rptr. 841 (1964) (en banc); State v. Larsen, 91 Idaho 42, 415 P.2d 685 (1966); People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952); *In re* Forsythe's Estate, 221 Minn. 303, 22 N.W.2d 19 (1946); Osborne v. Purdome, 250 S.W.2d 159 (Mo. 1952) (en banc); Sutter v. Easterly, 354 Mo. 282, 189 S.W.2d 284 (1945); More v. Metropolitan Life Ins. Co., 237 S.W.2d 210 (Mo. Ct. App. 1951); Blocker v. State, 55 Tex. Crim. 30, 114 S.W. 814 (1908); Newberry v. Commonwealth, 191 Va. 445, 61 S.E.2d 318 (1950); MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 218, at 673 (2d ed. E. Cleary 1972) [hereinafter cited as MCCORMICK]; Annot., 92 A.L.R.3d 1164 (1979).

[17]383 N.E.2d 293 (Ind. 1978). For further discussion of this case, see Arthur, *Workmen's Compensation, 1979 Survey of Recent Developments in Indiana Law,* 13 IND. L. REV. 439, 447-55 (1980); Greenberg, *Administrative Law, 1979 Survey of Recent Developments in Indiana Law,* 13 IND. L. REV. 39, 42-45 (1980).

[18]383 N.E.2d at 293-94.

the board's determination in light of the "residuum rule."[19] Evidence of causation consisted solely of testimony from Robinson's treating physician.

After Robinson had complained of nausea, vomiting, and general weakness, he was hospitalized. Within a week he died as a result of kidney and liver failure. His treating physician testified that he had been asked by the decedent's sister-in-law whether his condition could have been caused by exposure to cleaning solvent. The inquiry prompted him to question Robinson, who stated in response that " 'he had tripped over a barrel or bucket of cleaning solvent and that it spilled all over the floor and that he got down and cleaned it up.' "[20] Proper objection to this testimony was made at the hearing.[21]

In accord with prior Indiana decisions, the supreme court held that medical history may form the basis of a medical opinion testified to at a trial; however, the history is hearsay if offered to prove facts asserted therein.[22] The *C.T.S.* court specifically rejected a rule adopted by the second district court of appeals which permitted the use of hearsay not falling within a traditionally recognized exception when a "circumstantial probability of trustworthiness" and a need for the evidence ex-

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[19]Indiana's residuum rule provides that it is improper but not reversible error for the board to admit incompetent hearsay evidence; however, an award must be supported by some competent evidence presented at the hearing. *See* Bohn Aluminum & Brass Co. v. Kinney, 161 Ind. App. 128, 314 N.E.2d 780 (1974); Robinson v. Twigg Indus. Inc., 154 Ind. App. 339, 289 N.E.2d 733 (1972); Asbestos Insulating & Roofing Co. v. Schrock, 114 Ind. App. 177, 51 N.E.2d 395 (1943), *overruled*, American Security Co. v. Minard, 118 Ind. App. 310, 77 N.E.2d 762 (1948); White Swan Laundry v. Muzolf, 111 Ind. App. 691, 42 N.E.2d 391 (1942).

[20]C.T.S. Corp. v. Schoulton, 354 N.E.2d 324, 330 (Ind. Ct. App. 1976), *rev'd*, 383 N.E.2d 293 (Ind. 1978).

[21]If proper objection is not made to hearsay, it may form the basis of an award or court decision. One Indiana court has explained:

> Hearsay evidence is not inherently unreliable. Rather, as Professor Wigmore suggests, it is technically incompetent and therefore excludable because generally "such statements lack the trustworthiness that the test of cross-examination might supply." But where no objection to such testimony is made at trial, the trier of fact and the reviewing court may afford to such evidence the probative effect afforded to otherwise competent evidence of similar import.

Turentine v. State, 384 N.E.2d 1119, 1121-22 (Ind. Ct. App. 1979) (citations omitted). The supreme court in *C.T.S.* stated: " 'But if not objected to, the hearsay (incompetent evidence) may form the basis for an award.' " 383 N.E.2d at 296 (quoting 354 N.E.2d at 332 (Buchanan, J., dissenting)).

[22]383 N.E.2d at 294 (citing City of Anderson v. Borton, 132 Ind. App. 684, 178 N.E.2d 904 (1962)). The court in Durham Mfg. Co. v. Hutchins, 115 Ind. App. 479, 58 N.E.2d 444 (1945) held: "Physicians are permitted to testify as to statements made to them by one who makes them for the purpose of securing diagnosis and treatment; not to establish the truth of the statements made, but to show the basis of the doctor's opinion." *Id.* at 483, 58 N.E.2d at 446.

isted.[23] The supreme court made no mention of the segment of the dissenting opinion in the court of appeals decision in *C.T.S.* which noted that the evidence offered did fall within a hearsay exception recognized by many state and all federal courts.[24] The supreme court's adherence to prior Indiana precedent and rejection of highly trustworthy evidence as substantive evidence was incorrect.

Evidence offered on behalf of the decedent's estate would have been admissible as an exception to the hearsay rule if offered in a federal court. Federal Rule of Evidence 803(4)[25] permits the use of statements made for medical diagnosis or treatment as substantive evidence. In order to be admissible, the statement must be "reasonably pertinent to diagnosis or treatment."[26] Robinson had an incentive to provide a truthful answer to the physician's questions about the cause of his deteriorating health if he desired to continue living. The doctor's discovery of the nature of the poison and its possible antidote depended on ascertainment of the poison's source. Although causation insofar as it relates to the location where an injury took place is usually unnecessary for treatment, it was an imperative requirement for the treatment of Robinson. The rationale for receiving testimony of this nature was expressed by Judge Learned Hand in *Meaney v. United States*:[27]

> A man goes to his physician expecting to recount all that he feels, and often he has with some care searched his consciousness to be sure he will leave out nothing. If his narrative of present symptoms is to be received as evidence of the facts, as distinguished from mere support for the physician's opinion, these parts of it can only rest upon his motive to disclose the truth because his treatment will in part depend upon what he says. . . .

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[23]American United Life Ins. Co. v. Peffley, 158 Ind. App. 29, 301 N.E.2d 651 (1973) (cited with approval in M. SEIDMAN, THE LAW OF EVIDENCE IN INDIANA 140 (1977)).

[24]354 N.E.2d at 331 (Buchanan, J., dissenting). The failure to mention this part of the dissenting opinion is surprising because the supreme court specifically adopted the dissenting opinion insofar as it rejected the use of hearsay evidence in violation of the residuum rule. 383 N.E.2d at 296.

[25]FED. R. EVID. 803(4) provides the following hearsay exception: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Advisory Committee notes to this section cite Shell Oil Co. v. Industrial Comm'n, 2 Ill. 2d 590, 119 N.E.2d 224 (1954), MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 266, at 564 (1st ed. 1954), as evidence of a modern trend to admit statements of causation pertinent to treatment. 4 J. WEINSTEIN, *supra* note 13, ¶ 803(4)[01], at 803-125 to -132 (1979).

[26]FED. R. EVID. 803(4).

[27]112 F.2d 538 (2d Cir. 1940).

> The same reasoning applies with exactly the same force to a narrative of past symptoms. . . . A patient has an equal motive to speak the truth; what he has felt in the past is as apt to be important in his treatment as what he feels at the moment.[28]

Judge Hand's opinion, although dealing with the admissibility of a statement of past symptoms, supports with equal force the admissibility of a statement of causation necessary for treatment. An individual rarely lies when his physical well-being is at stake.

Current Indiana law treats statements of presently existing bodily condition made by a patient to his physician as an exception to the hearsay rule.[29] As noted by Judge Hand, to admit evidence of this nature while excluding medical history is illogical. In each circumstance, the reliability and admissibility is premised upon a person's desire to receive effective medical treatment. Although the various states disagree about a rule requiring the exclusion of statements of medical history relating to cause,[30] the better position appears to be that statements of this nature are admissible if they were reasonably needed for diagnosis or treatment.[31]

The *C.T.S.* court's specific rejection of evidence not falling within a traditionally recognized exception but showing " 'a circumstantial probability of trustworthiness and a necessity for the evidence' "[32] must also be considered. Use of evidence meeting these requirements was first permitted in Indiana courts by the second district court of appeals in *American United Life Insurance Co. v. Peffley.*[33] *American Life* was consistent with the trend among federal and state courts allowing the fact finder to consider all reliable evidence.[34] Federal Rules of Evidence 803(24) and 804(5) em-

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[28]*Id.* at 539-40.

[29]Indiana Union Traction Co. v. Jacobs, 167 Ind. 85, 78 N.E. 325 (1906); Haste v. Radio Corp. of America, 146 Ind. App. 528, 257 N.E.2d 313 (1970).

[30]*See* Jensen v. Elgin, Joliet & E. Ry., 24 Ill. 2d 383, 182 N.E.2d 211 (1962); Board of Comm'rs v. Leggett, 115 Ind. 544, 18 N.E. 53 (1888); Goldstein v. Sklar, 216 A.2d 298 (Me. 1966); Note, *Evidence—Admissibility of Expressions of Pain and Suffering*, 51 MICH. L. REV. 902 (1953); Annot., 37 A.L.R.3d 788, 802-16 (1971). A majority of jurisdictions require the exclusion of any statement dealing with cause. MCCORMICK, *supra* note 16, § 292, at 690-91.

[31]*See* Shell Oil Co. v. Industrial Comm'n, 2 Ill. 2d 590, 119 N.E.2d 224 (1954); MCCORMICK, *supra* note 16, § 292, at 691; M. SEIDMAN, *supra* note 23, at 130-31.

[32]383 N.E.2d at 295 (quoting American United Life Ins. Co. v. Peffley, 158 Ind. App. 29, 41, 301 N.E.2d 651, 658 (1973)).

[33]158 Ind. App. 29, 301 N.E.2d 651 (1973).

[34]Professor Seidman in his text on Indiana evidence wrote:

> Fortunately, the existing exceptions to the hearsay rule have not been frozen in place for all time either in Indiana or in the federal courts. The prior exceptions arose when the trial judges perceived that the offered evidence was not then within a recognized exception to the rule, yet it had a circumstantial

body this principle. Both rules permit the use of statements not falling within specifically enumerated exceptions when

> (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.[35]

It is clear that evidence which will be rejected in future Indiana cases in conformity with *C.T.S.* would be admitted in federal courts. This may cause attorneys to select a forum for their civil actions based upon considerations of evidence admissibility. It will serve to increase forum shopping and in some cases make the outcome depend on the fortuity of federal jurisdiction. Absent strong policy interests which did not exist in *C.T.S.* in maintaining a specific rule of evidence, rules of evidence in both state and federal courts should be similar. When the state rule of evidence is without logical support, the federal rule should be adopted.

3. Former Testimony.—Former testimony as an exception to the hearsay rule was the subject of two recent Indiana Supreme Court opinions that indicate Indiana's treatment of the exception is consistent with Federal Rule of Evidence 804(b)(1).[36] Basic requirements for the exception were well illustrated in *Kimble v. State*.[37] The defendant's first trial in *Kimble* for the burglary and murder of two elderly women ended in a mistrial. At the defendant's retrial on the same charges, a witness who had testified

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> probability of trustworthiness and there was a necessity for its use in the circumstances of the present case. If these two criteria exist today, then a further exception in a particular case should be granted because the reason for the rule has been satisfied.

M. SEIDMAN, *supra* note 23, at 140. *See* Dalis County v. Commercial Union Ass'n, 286 F.2d 388 (5th Cir. 1961); United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968). As to Indiana, Professor Seidman's jubilation was premature in light of *C.T.S.*

[35]FED. R. EVID. 803(24), 804(5).

[36]FED. R. EVID 804(b)(1) provides that "if the declarant is unavailable as a witness," then the court may use testimony that the declarant gave at another proceeding, provided the party taking the testimony had a "motive and interest similar to those of the party" now seeking to introduce the former testimony.

[37]387 N.E.2d 64 (Ind. 1979). The former testimony exceptions require that the party against whom the statement is offered or his successor in interest had an opportunity and similar motive to cross-examine the declarant and that the declarant must be unavailable for trial. Henderson v. State, 259 Ind. 248, 286 N.E.2d 398 (1972); Deep Vein Coal Co. v. Dowdle, 224 Ind. 244, 66 N.E.2d 598 (1946); Levi v. State, 182 Ind. 188, 104 N.E. 765 (1914); FED. R. EVID. 804(b)(1); MCCORMICK, *supra* note 16, § 255, at 616-17; M. SEIDMAN, *supra* note 23, at 115-18; 4 J. WEINSTEIN, *supra* note 13, ¶ 804(b)(1)[04], at 804-65 to -72.

at the first trial was determined to be unavailable.[38] After the prosecution showed an extensive good faith effort to discover the whereabouts of the missing witness,[39] a transcript of the witness' testimony was read into the record at the second trial.[40] On appeal, the Indiana Supreme Court properly rejected the defendant's allegation of error predicated upon the receipt of this evidence.[41]

Unlike other hearsay exceptions, former testimony does not rely upon circumstances to provide the guarantees of trustworthiness usually furnished by cross-examination and oath. Both oath and the opportunity to cross-examine were present. Former testimony differs from other testimony only in the absence of the trier of fact at the time testimony is taken. Because of the importance of demeanor evidence, which is available only if the witness is before the trier of fact, former testimony as an exception to the hearsay rule is limited to situations in which the witness is unavailable.[42] At criminal trials,

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[38]387 N.E.2d at 65-66.

[39]A comprehensive effort was made to determine the whereabouts of the witness Summers:

> (1) Summers had been subpoenaed through the sheriff and the United States mail and had not been available for process; (2) her last known residence was checked; (3) her mother was contacted and did not know her whereabouts; (4) Christopher Petty, her boyfriend, stated that he had not seen her in six months; (5) registration in adult educational courses in Marion County was checked; (6) the city directory, the criss-cross directory, the telephone directory, and a canvassing of the neighborhood and potential places of employment did not reveal her; (7) the post office stated that Summers had left no forwarding address; (8) all the utility companies were called and there was no account for Donna Summers or D. Summers; (9) Summers had never obtained an operator's permit and had no car and no plates and was not listed with the Bureau of Motor Vehicles; (10) the Social Security Administration advised the investigator that Summers was not employed; (11) a check with the police department records reveal[ed] that . . . Summers was not and had not been a defendant in any cause but had been a victim; (12) leads from the county welfare and township trustee's office led investigators to an address on College, and at least a dozen unsuccessful attempts were made to ascertain whether Summers was there; (13) the Drug Enforcement Administration informed the investigators that Summers was not on record with them; and (14) although it was discovered that welfare checks were being sent to the College address (also Summers's mother's address), ostensibly for the witness who has a small child, Summers's mother's name is also Donna Summers.

Id.

[40]*Id.*

[41]*Id.*

[42]Professor Seidman in his work on Indiana evidence states:

> Technically it is hearsay only because of the lack of the personal presence of the witness at the present trial so that the jurors may observe his demeanor. Since there is a strong policy favoring the personal presence of the witness for demeanor evaluation, in order for his former testimony to be received, it is necessary to demonstrate to the trial judge the unavailability of the witness . . . .

M. SEIDMAN, *supra* note 23, at 115-16.

former testimony evidence offered against a defendant violates his sixth amendment right of confrontation, unless the witness is actually unavailable.[43] In *Kimble*, the court properly received the witness' prior testimony because she was unavailable by any criteria for the retrial, but had been available for cross-examination by the defendant at the previous mistrial.[44]

The use of prior testimony in *Kimble* should be contrasted with its rejection in *Bryant v. State*.[45] In *Bryant*, the supreme court held that a transcript offered by the defendant of his extradition hearing was properly rejected.[46] The defendant's theory on appeal was that his prior self-serving statement was admissible as prior testimony because it had been given under oath and had been subject to cross-examination at the hearing. Because he elected not to testify, the defendant claimed that he was "constitutionally unavailable" and that use of the former testimony was impermissible.[47]

The court's rejection of the defendant's alleged error was correct. Unavailability for purposes of the use of former testimony does not include those situations in which the party offering the evidence has procured the unavailability of the witness.[48] The *Bryant* court reasoned: "[The witness] had every right to decline to testify, but it cannot be said that he was unavailable simply because he could not be required to testify."[49] Necessity, which is the rationale for the exception, does not exist when the availability of the witness is within control of the proponent of the evidence.

Consideration of unavailability aside, the evidence was still properly rejected. The defendant's allegation that the offered former testimony had been subject to cross-examination was not alone sufficient to meet the requirements of admissibility. The common law, in order to ensure that the prior examination of the witness was as it would have been at trial if the witness were available, required identity of both issues and parties.[50] Although the parties in *Bryant* were the same at both the extradition hearing and the trial, the issues were not. At the extradition hearing, the subject of the inquiry was limited "to the issues of whether or not the defendant was the person sought."[51] At the hearing, the State had no reason to

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[43]Berger v. California, 393 U.S. 314 (1969); Barber v. Page, 390 U.S. 719 (1968).

[44]387 N.E.2d at 66.

[45]385 N.E.2d 415 (Ind. 1979).

[46]*Id.* at 419-20.

[47]*Id.* at 420.

[48]*See* FED. R. EVID. 804(a) which states: "A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement . . . ."

[49]385 N.E.2d at 420.

[50]MCCORMICK, *supra* note 16, §§ 256-257, at 617-22.

[51]385 N.E.2d at 419. *See* Taylor v. Smith, 213 Ind. 640, 13 N.E.2d 954 (1938); Lawrence v. King, 203 Ind. 252, 180 N.E. 1 (1932).

cross-examine the defendant. Although the court did not require the strict common law rule of identity of issues and parties, it did require that a similar motive for cross-examination exist.[52] According to the supreme court, a similar motive to cross-examine did not exist when the issues were as different as identity and guilt.[53] The use of the similar motive test brings Indiana in line with Federal Rule of Evidence 804(b)(1).

B. Cross-Examination

1. The Indiana Rape Shield Statute.—Indiana Code sections 35-1-32.5-1 to -4 generally prohibit the defendant in a prosecution for a sex crime from offering evidence of his alleged victim's past sexual conduct.[54] Only "evidence of the victim's or a witness's past sexual conduct with the defendant" or "evidence which in a specific instance of sexual activity shows that some other person than the defendant committed the act upon which the prosecution is founded" may be introduced.[55] Opinion and reputation evidence concerning a rape victim's past sexual activity is specifically prohibited. Although commonly referred to as a "rape shield law," it applies to other sex crimes[56] and is in accord with a modern trend to limit the admissibility of such evidence.[57] Statutes of this type are legislative determinations of legal relevancy because they hold that the prejudicial effect of evidence of a sex crime victim's prior sexual conduct generally outweighs the evidence's probative value. A blanket rule excluding evidence of a victim's prior sexual conduct, without regard to its actual probative value, however, should be held unconstitutional when the probative value is great.[58] In every case, a

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[52]385 N.E.2d at 419-20.

[53]*Id.*

[54]IND. CODE § 35-1-32.5-1 (Supp. 1979) provides:

> In a prosecution for a sex crime as defined in [IND. CODE §] 35-42-4, evidence of the victim's past sexual conduct, evidence of the past sexual conduct of a witness other than the accused, opinion evidence of the victim's past sexual conduct, opinion evidence of the past sexual conduct of a witness other than the accused, reputation evidence of the victim's past sexual conduct, and reputation evidence of the past sexual conduct of a witness other than the accused may not be admitted, nor may reference be made to this evidence in the presence of the jury, except as provided in this chapter.

[55]*Id.* § 35-1-32.5-2(b), (c).

[56]The sex crimes referred to in the act are rape, *id.* § 35-42-4-1; unlawful deviate conduct, *id.* § 35-42-4-2; child molesting, *id.* § 35-42-4-3; and child exploitation, *id.* § 35-42-4-4.

[57]*See* FED. R. EVID. 412; ROTHSTEIN, RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES 104-06 (1978) (citing CAL. PENAL CODE § 1127d (West 1974); COLO. REV. STAT. § 18-3-407 (1973); FLA. STAT. ANN. § 794.022 (Supp. 1979); IOWA CODE ANN. § 813.2, R20 (1979); MICH. COMP. LAWS ANN. § 750.520 (1968); N.Y. LAW CRIM. PROC. (McKinney) § 60.42 (Supp. 1979); S.D. COMPILED LAWS ANN. § 23-44-16.1 (1967)).

[58]*See* Clinton, *The Right to Present a Defense: An Emergent Constitutional*

court should make an individual determination of legal relevance.[59]

In *Lagenour v. State*,[60] the Indiana Supreme Court had an opportunity to consider the constitutionality of the Indiana statute insofar as it limits the ability of a defendant to cross-examine his alleged victim and other witnesses. Prior to trial, the State in *Lagenour* had "sought and received an order prohibiting . . . [the defense] from examining the prosecuting witness and the other alleged victims" of the defendant's sexual assaults concerning prior sexual conduct.[61] On appeal, the court upheld the order by relying not only on the statute but also on the trial court's "inherent discretionary power to exclude and admit evidence and to grant motions in limine."[62] Reliance upon the inherent power of a trial court was necessary because the defendant was charged with both sexual and non-sexual offenses at the same trial. If the court did not exercise this inherent power, evidence of the alleged victim's prior sexual conduct could not be excluded under the rape shield statute if the evidence related to non-sexual charges against the accused.[63]

As the court correctly perceived in *Lagenour*, the only constitutional issue on appeal was whether the trial court's order prevented the defendant from conducting a full and free cross-examination.[64] The appellant's only allegation of harm was that the limitation deprived him of " 'reasonable latitude in effectively cross-examining the witness . . . in eliciting facts concerning their prior sexual conduct for the purposes of revealing their reputations for veracity, possible biases, prejudices or ulterior motives.' "[65] The court found this general claim of prejudice to be insufficient to sustain the appellant's claim that the ruling prevented effective cross-examination.[66]

Guarantee in Criminal Trials, 9 IND. L. REV. 711 (1976); Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?*, 9 IND. L. REV. 418 (1976); Comment, *Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska*, 73 MICH. L. REV. 1465 (1976).

[59]FED. R. EVID. 412 provides that evidence is admissible in circumstances not specifically mentioned in the rule if it "is constitutionally required to be admitted." It has been suggested that this limitation may be read into the Indiana rape shield statute to prevent the entire statute from being held unconstitutional. *See* Note, *Indiana's Rape Shield Law: Conflict with the Confrontation Clause?*, *supra* note 58, at 440.

[60]376 N.E.2d 475 (Ind. 1978).

[61]*Id.* at 478.

[62]*Id.* at 479 (emphasis omitted).

[63]*Id.*

[64]The appellant made no attempt to offer affirmative evidence of the prior sexual history or reputation of the state witnesses. *Id.*

[65]*Id.*

[66]*Id.*

In light of prior Indiana law, this part of the opinion must be considered incorrect. As early as 1883, in *Wood v. State*,[67] the supreme court wrote: "In order to avail himself of a ruling denying a right to ask a question, the party by whom the witness is produced must state what he expects to prove. The rule, however, is otherwise on cross-examination. In the latter case the cross-examining party is not required to make such a statement."[68] If an offer of proof is made on cross-examination, it may be ordered stricken on the rationale that the cross-examiner cannot know what the witness will answer.[69] Because it was impossible under Indiana law for the defense in *Lagenour* to make an offer of proof,[70] it becomes difficult to determine the method whereby a defendant may show "an actual impingement upon cross-examination," as required in the opinion.[71]

The only guidance to counsel in future cases is contained in the court's statement:

> There is no suggestion made of the existence of any line of questioning related to any of the witnesses which could have been followed in the absence of the limitation. There is no suggestion made that any of the witnesses might have an attitude or inclination which could be the product of prior sexual conduct.[72]

If this requirement may be met by merely reading into the record questions (a line of questioning) that would be asked absent the limitation, the holding in *Lagenour* becomes one of form over substance. Assuming that this would be insufficient, the court should have clearly stated what would be sufficient to preserve the question on appeal.

A more comprehensive attack on the rape shield statute was rejected by the Indiana Court of Appeals in *Finney v. State*.[73] The defendant in *Finney* first alleged that the statute infringed upon his right to attack the credibility of the prosecutrix through her prior sexual conduct. On the authority of *Lagenour* and *Borosh v. State*,[74]

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[67]92 Ind. 269 (1883).

[68]*Id.* at 273.

[69]Walker v. State, 255 Ind. 65, 68, 262 N.E.2d 641, 643 (1970), *overruled on other grounds*, Hardin v. State, 265 Ind. 635, 358 N.E.2d 134 (1976).

[70]The *Lagenor* court, in fact, stated that Indiana law prevents the cross-examining counsel from making an offer of proof. 376 N.E.2d at 479.

[71]*Id.*

[72]*Id.*

[73]385 N.E.2d 477 (Ind. Ct. App. 1979).

[74]336 N.E.2d 409 (Ind. Ct. App. 1975). The court held:

Thus it is clear that only a total denial of access to such an area of cross-examination presents a constitutional issue. Any lesser curtailment of cross-

the court found that this general allegation was insufficient to demonstrate trial court error.[75] The court noted that the defendant could have impeached the prosecutrix on other grounds, such as prior convictions, and reputation for truth and veracity.[76] The court, in effect, held that only a total denial of cross-examination on credibility issues constitutes an impingement of cross-examination.[77]

A second claim of constitutional error was made by the defendant. Specifically, the defendant alleged that the rape shield statute violated the equal protection clause of the fourteenth amendment by discriminating against rape defendants.[78] The claim was based on the fact that limitations on the type of character evidence introduced at trial occur only in sex cases. Finding that rape defendants are not a suspect classification, the court held that the classification bore a fair relationship to the purpose of the statute.[79]

The defendant also attacked the rape shield statute by alleging that it was an ex post facto law.[80] His allegation was that the statute "introduced a new rule of evidence which made it easier to convict him."[81] As correctly noted by the court, "the inquiry turns on

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examination by the trial court is viewed as a regulation of the scope of such examination, and such curtailment is reviewable only for an abuse of discretion.

Id. at 412-13.

[75]385 N.E.2d at 480.

[76]*Id.*

[77]*Id.*

[78]*Id. See* U.S. CONST. amend. XIV

[79]385 N.E.2d at 480. Because rape defendants are not a suspect classification, the equal protection clause only demands that a rational basis exist for the classification and that the classification have a reasonable relationship to the purpose of the statute. Geyer v. City of Logansport, 370 N.E.2d 333 (Ind. Ct. App. 1977). *See* Marshall v. United States, 414 U.S. 417 (1974). The rape shield statute is a proper attempt by the legislature to protect the prosecuting witnesses at sex crime trials from harassment that might arise if their prior sex life were disclosed in court. Roberts v. State, 373 N.E.2d 1103 (Ind. 1978). The *Finney* court also held that the rape shield statute helps crime prevention because the victim will be "encouraged to report rape offenses" if evidence of embarrassing sexual activity is not admitted. 385 N.E.2d at 480.

[80]385 N.E.2d at 480. The United States Supreme Court has defined an ex post facto law as follows:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

[81]385 N.E.2d at 480.

whether the statute changed a 'substantial right' or 'mere procedure.' "[82] In 1882, the Indiana Supreme Court held that "a new statute permitting the use of general moral character evidence to impeach a witness was not an ex post facto law."[83] The court in 1882 reasoned that the statute provided a rule of procedure "applicable to trials for offenses committed before and after its passage."[84] Accepting the determination that permitting use of character evidence would not be ex post facto, the *Finney* court found that denial of the use of a particular type of character evidence did not violate the ex post facto clause.[85]

2. Psychiatric Witnesses.—A defendant's pleading of insanity as a defense to a charge of robbery opened the door to evidence not otherwise admissible in *France v. State.*[86] Prior to trial, the defendant at a motion in limine hearing obtained an order from the trial court precluding the State from mentioning "any prior crimes or criminal records of the defendant."[87] The motion characterized evidence of prior crimes as "immaterial, irrelevant and highly prejudicial."[88] During cross-examination of two defense psychiatric witnesses, the prosecution over defense objection asked whether they had considered the defendant's criminal record in formulating their diagnoses. The prior crimes involved convictions for robbery, bank robbery, and passing a bad check, and covered a period from 1961 to 1972.[89]

In determining that the evidence of prior crimes was properly before the court, the court noted that "it is well settled that a plea of not guilty by reason of insanity opens the door for evidence of past behavior, including prior criminal conduct."[90] The court stated further that "once a plea of insanity is offered by a defendant, all relevant evidence is admissible."[91] In *France*, the State properly

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[82]*Id.* (citing Warner v. State, 265 Ind. 262, 354 N.E.2d 178 (1976)).

[83]385 N.E.2d at 480 (citing Robinson v. State, 84 Ind. 452 (1882) (emphasis omitted)).

[84]*Id.* at 453.

[85]385 N.E.2d at 480-81. The court's determination of this issue is in accord with prior law. It is settled law that statutory changes in the rules of evidence which do not deprive an accused of a legitimate defense and which operate only in a limited manner to his disadvantage are not in violation of the ex post facto clause. Beazell v. Ohio, 269 U.S. 167 (1925). *See* Thompson v. Utah, 170 U.S. 43 (1898); Gillioz v. Kincannon, 213 Ark. 1010, 214 S.W.2d 212 (1948); Winston v. State, 186 Ga. 573, 198 S.E. 667 (1938).

[86]387 N.E.2d 66 (Ind. Ct. App. 1979).

[87]*Id.* at 70.

[88]*Id.*

[89]*Id.* at 70-71.

[90]*Id.* at 71.

[91]*Id.* (citing Stevens v. State, 265 Ind. 396, 354 N.E.2d 727 (1976); Twomey v. State, 256 Ind. 128, 267 N.E.2d 176 (1971)).

questioned the defense's psychiatric witnesses concerning the defendant's prior criminal conduct because it was relevant to the credibility of the witnesses' conclusions.[92]

The court's opinion is clearly correct. Indiana law provides that a mental disease or defect for purposes of defending a criminal "does not include an abnormality manifested only by repeated unlawful or antisocial conduct."[93] Proper cross-examination of a defendant's psychiatric witnesses would include an inquiry as to the extent, if any, their diagnoses were based upon this forbidden criteria. Questions dealing with the criminal history of the defendant are also necessary to determine whether their opinions were based upon an adequate investigation of the accused. If defense psychiatrists are unaware of a defendant's prior criminal record, it would indicate that their opinions are based upon inadequate or incomplete information. A disclosure that they are unaware of the prior record would adversely affect the weight to be given their testimony. The *France* court aptly concluded that "although evidence of prior convictions may be prejudicial in certain circumstances [to a defendant], the State's interest in arriving at the truth will prevail where the evidence is relevant to a material issue."[94]

C. Impeachment

1. Prior Inconsistent Statements.—The issue of whether a prior statement of opinion by a witness inconsistent with that he offers in court testimony may be used for impeachment was analyzed by the supreme court in *Inman v. State.*[95] At the defendant's trial for murder, he made two attempts to demonstrate that witnesses had made prior statements inconsistent with their testimony. The first attempt was made when a witness was asked on cross-examination whether she had ever told anyone her thoughts on the shooting. An objection to this question as conclusory and without foundation was sustained.[96] The *Inman* court found no error on the part of the trial judge because "[the witness] had not yet been asked, and never was asked, for her thoughts or opinion on any aspect of the case."[97] The court concluded that "there was no testimony to impeach and the question was irrelevant at the time."[98] Unless

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[92]Holt v. State, 382 N.E.2d 1002 (Ind. Ct. App. 1978); Whitten v. State, 263 Ind. 407, 333 N.E.2d 86 (1975).

[93]IND. CODE § 35-41-3-6(b) (Supp. 1979).

[94]387 N.E.2d at 71 (citing Powers v. State, 380 N.E.2d 598 (Ind. Ct. App. 1978)).

[95]383 N.E.2d 820 (Ind. 1978).

[96]*Id.* at 823.

[97]*Id.*

[98]*Id.*

statements of opinion are to be excluded when offered for impeachment, the court's holding is clearly wrong. Further questions could have disclosed that the witness had previously made statements of opinion inconsistent with her testimony. The court's treatment of this issue with a second witness indicates that the line of questioning was terminated because it dealt with prior inconsistent statements of opinion.

The second witness was asked on cross-examination whether she had ever told anyone that "she thought the shooting was an accident."[99] The trial court sustained the State's objection that the second witness' statement was hearsay.[100] On appeal, exclusion of the question was held to be proper because the question called for a conclusion on the part of the witness.[101] This is, of course, not true. The question did not ask for the witness' opinion; it asked whether the witness had previously stated an opinion. It is therefore necessary to decide whether statements of opinion inconsistent with testimony given in court should be considered in determining the weight to be given a witness' testimony. An excellent analysis of this issue is contained in *McCormick's Handbook on the Law of Evidence*:[102]

> Moreover, when the out-of-court statement is not offered at all as evidence of the fact asserted, but only to show the asserter's inconsistency, the whole purpose of the opinion rule, to improve the objectivity and hence reliability of testimonial assertions is quite inapplicable. Hence, though many earlier decisions . . . and some later opinions, exclude impeaching statements in opinion form, the trend of holdings and the majority view is in accord with the commonsense notion that if a substantial inconsistency appears the form of the statement is immaterial.[103]

The logic of this statement is unassailable and requires no further comment.

2. Prior Convictions.—What constitutes a conviction for purposes of impeachment was a question of first impression for the supreme court in *McDaniel v. State.*[104] The defendant, who had been

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[99] *Id.*

[100] *Id.*

[101] *Id.* (citing Fletcher v. State, 241 Ind. 409, 172 N.E.2d 853 (1961)).

[102] McCormick, *supra* note 16.

[103] *Id.*, § 35, at 69-70 (citations omitted).

[104] 375 N.E.2d 228 (Ind. 1978). Although a similar issue was before the court in Johnson v. Samuels, 186 Ind. 56, 114 N.E. 977 (1917), the jury verdict of guilty was set aside, and a new trial ordered before the verdict of guilty was offered for purposes of impeachment. *Id.* at 66-67, 114 N.E. at 980-81. For purposes of impeachment, only convictions for treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, and

convicted of second degree murder, raised on appeal a claim of error predicated upon a motion in limine denied by the trial judge. Prior to trial, the defendant had moved to exclude evidence of his two prior pleas of guilty to charges of theft by check which the State had used for purposes of impeachment. In each case, final judgment and sentence had been withheld.[105] Because final judgment had not been entered, the defendant alleged that he had never been convicted of the crimes.[106] In upholding the ruling of the trial court, the supreme court cited *State v. Redman*,[107] wherein it was stated: "It is usually considered that there has been conviction of crime when there is a plea of guilty to a charge duly presented or a finding or verdict of guilty after trial, and that thereafter the presumption of innocence no longer follows the defendant."[108] This language in *Redman* was merely dicta; the *Redman* court had in fact entered a formal judgment and sentenced the respondent, who was in prison under that sentence at the time the opinion was written.[109] Notwithstanding the reliance on dicta, *McDaniel* correctly defined a conviction for purposes of impeachment.

Although a matter of first impression in Indiana, courts in other jurisdictions have had occasion to consider the issue. In *Commonwealth v. Reynolds*,[110] a Kentucky court wrote:

> [T]he word ["conviction"] admits of different interpretations and . . . it had a two-fold meaning: one is the determination of the fact of guilt, as by the verdict of a jury or by confession. The other denotes the final judgment in a prosecution when it is employed in speaking of a state of infamy. The truth of those observations will be impressed upon anyone who peruses the thirty-eight pages in Word and Phrases, Vol. 9A, which are devoted to cases in which this word had been defined. The word generally means the ascertainment of defendant's guilt by some legal mode and an adjudication that the accused is guilty. This may be accomplished by a confession by the accused in open court, a plea of guilty or a verdict which ascertains and publishes the fact of guilt. We believe in the majority of those cases and in the majority of jurisdictions (although we have not counted

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willful and corrupt perjury, as well as crimes involving dishonesty or false statement, are admissible. Ashton v. Anderson, 258 Ind. 51, 279 N.E.2d 210 (1972).

[105]375 N.E.2d at 230.

[106]*Id.*

[107]183 Ind. 332, 109 N.E. 184 (1915).

[108]*Id.* at 342, 109 N.E. at 188.

[109]*Id.* at 336, 109 N.E. at 186.

[110]365 S.W.2d 853 (Ky. 1963).

noses), the word "conviction" is not limited to a final judgment.[111]

At least until a guilty plea has been withdrawn or a jury verdict set aside, such evidence of conviction is relevant as affecting a witness' credibility.

It has been suggested, however, by Judge Weinstein in his text on federal evidence that a distinction should be made between situations in which a jury verdict exists and those in which a plea of guilty has been entered.[112] A jury verdict is, in fact, a determination of guilt, based upon a consideration of evidence produced at an adversary proceeding. The possibility that a motion for a new trial might be granted is equivalent to a possibility of reversal on appeal, which by the majority rule does not prevent the use of a conviction for impeachment.[113] When no jury verdict exists and a plea of guilty is before the court, Judge Weinstein reasons that the possibility always exists that the plea will be withdrawn.[114]

Upon analysis, it appears that jury verdicts and guilty pleas that have been accepted after a proper inquiry should not be treated differently. If the court has made a thorough inquiry into the providency of a guilty plea, the presumption of guilt is at least as strong as that of a jury verdict. The *McDaniel* court's observation that the defendant had made a judicial confession to the crimes in question indicates that the court made a complete inquiry into his guilty pleas.[115] Withdrawal of a guilty plea after acceptance by the court is not a matter of right, and the possibility of a judge permitting withdrawal is not too different from the possibility of his granting a new trial after a jury verdict. At most, a defendant should be permitted to explain to the jury his reason for pleading guilty and to show that neither a formal finding of guilt nor any sentencing has been entered by the court. *McDaniel* is consistent with the modern trend among courts considering the question.[116]

D. Opening the Door

A recent Indiana Supreme Court decision demonstrates that otherwise inadmissible and prejudicial evidence may become admissible if necessary to rebut a misleading and incomplete picture

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[111] *Id.* at 854 (citing 9A WORDS AND PHRASES *Convicted; Convictions* 270-304 (1960)).

[112] 3 J. WEINSTEIN, *supra* note 13, ¶ 609[06], at 609-89 (1978).

[113] *Id. See* FED. R. EVID. 609(e); Annot., 16 A.L.R.3d 726 (1967).

[114] 3 J. WEINSTEIN, *supra* note 13, ¶ 609[06], at 609-89 (1978).

[115] 375 N.E.2d at 230.

[116] *See* United States v. Klein, 560 F.2d 1236 (5th Cir. 1977); United States v. Rose, 526 F.2d 745 (8th Cir. 1975), *cert. denied*, 425 U.S. 905 (1976); State v. Reyes, 99 Ariz. 257, 408 P.2d 400 (1965); Annot., 14 A.L.R.3d 1272 (1967).

created by direct examination. In *Gilliam v. State*,[117] the defendants were convicted of unlawful dealings in a Schedule I controlled substance.[118] Prior to trial, the defendants at a motion in limine hearing obtained an order from the trial judge instructing the prosecutor "to make no reference in the presence of the jury to any separate offenses committed by" the defendants, unless admissible for impeachment.[119] During direct examination of one of the defendants, the defense counsel elicited a detailed history of her heroin abuse and addiction.[120] The defendant also denied transferring the heroin as charged.[121] The defendant testified that she had used heroin for two years prior to her arrest and that subsequent to her arrest she had successfully sought treatment for her addiction.[122]

On cross-examination, the State asked the defendant, " 'Have you been dealing in drugs for a long time, too?' "[123] In response, the defendant denied ever dealing in drugs.[124] In rebuttal to her testimony, the prosecution called a witness who, over defense objection, related making drug purchases from the defendant before the incident in question.[125] This cross-examination and rebuttal were cited as prejudicial errors in the appeal. The court correctly decided that these matters were not prejudicial errors.

At the time the pretrial motion in limine was made, it was properly granted by the trial court. Evidence of other criminal offenses committed by an accused is generally not admissible to prove commission of the crime under consideration.[126] In addition, Indiana law

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[117]383 N.E.2d 297 (Ind. 1978).

[118]IND. CODE § 35-48-4-1 (Supp. 1979) provides that dealing in cocaine or a narcotic drug is a Class B felony if the amount is under three grams.

[119]383 N.E.2d at 300.

[120]*Id.*

[121]The record contains the following direct examination:

Q. Alright. Now, you heard Mr. Schultz, Doug Schultz testify yesterday that when you came back to the house, you placed three tinfoil packets on the kitchen table?

A. That's—but, I never had—I know I have never did that.

Q. Alright. I wanta ask you. Did, except for the one tablet that your husband uh gave to you, did you have any heroin at all in your possession that day?

A. No, I didn't.

Id. at 300.

[122]*Id.*

[123]*Id.* at 301.

[124]*Id.*

[125]*Id.*

[126]An exception to general inadmissibility is when the evidence tends to establish: "(1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proving of one tends to establish the other; (5) the identity of the person charged with the crime on trial." Hergenrother v. State, 215 Ind. 89, 92, 18 N.E.2d 784, 786 (1939). Evidence of entirely distinct and separate crimes, however, cannot be used to show a

provides that an accused may not be impeached by cross-examination or evidence concerning other criminal acts that did not result in a conviction,[127] thereby meeting the standards set out in *Ashton v. Anderson*[128] for impeaching credibility through prior convictions. However, at the time the motion was granted, the trial court was not aware of the nature of the evidence that would be presented by the defense.

The appellant's argument on appeal assumed, incorrectly, "that the granting of [a] motion *in limine* is a final determination of . . . inadmissibility."[129] On appeal, the correct issue was whether the cross-examination and evidence were proper and not whether they were embraced by the ruling on the pre-trial motion. Resolution of this question required a determination of whether evidence presented by the defendant had created an incomplete and misleading picture. The court reasoned:

> In so casting this extended period of appellant's former life as involving only the illegal use of drugs, the defense sought to persuade the jury to infer that her involvement with drugs or the occasion charged was likewise so limited. As the basis for this salient inference appellants presented a misleading and incomplete picture of appellant Braxton's involvement with heroin . . . .[130]

Logic dictates that an accused should not be permitted to create false and misleading inferences through the use of incomplete evidence.[131] When evidence of an incomplete and misleading nature

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disposition to commit the crime charged. Zimmerman v. State, 190 Ind. 537, 542, 130 N.E. 235, 237 (1921). *See* FED. R. EVID. 404(b).

[127]When an accused testifies, the prosecution may cross-examine him to test his credibility; however, such an attack on credibility may not focus on particular "acts of misconduct other than prior convictions." Shropshire v. State, 258 Ind. 39, 44, 279 N.E.2d 225, 227 (1972). *See* Jenkins v. State, 372 N.E.2d 166 (Ind. 1978). *But see* FED. R. EVID. 608(b).

[128]258 Ind. 51, 279 N.E.2d 210 (1972). For purposes of impeaching credibility of a witness, only convictions for certain crimes are admissible. *See* note 104 *supra*. *See also* Fletcher v. State, 264 Ind. 132, 340 N.E.2d 771 (1976); Adams v. State, 366 N.E.2d 692 (Ind. Ct. App. 1977).

[129]383 N.E.2d at 301. Granting a motion in limine is not a final ruling upon the ultimate admissibility of evidence. The motion's purpose is to prevent the proponent of potentially prejudicial matter from displaying it to the jury or making statements about it before the jury until the trial court has ruled upon its admissibility in the context of the trial itself. Lagenour v. State, 376 N.E.2d 475 (Ind. 1978); Baldwin v. Inter City Contractors Serv. Inc., 156 Ind. App. 497, 297 N.E.2d 831 (1973).

[130]383 N.E.2d at 302.

[131]*See* United States v. Cuadrado, 413 F.2d 633 (2d Cir. 1969). Even when evidence is unlawfully obtained, it may become admissible if necessary to rebut perjurious testimony of the accused. Walder v. United States, 347 U.S. 62 (1954). In *Walder*,

is presented, the prosecution should be permitted to use otherwise inadmissible evidence to complete the mosaic only partially depicted by the defense. The *Gilliam* court correctly extracted the salient point from many prior opinions[132] when it held that a defendant opens the door when he leaves "the trier of fact with a false or misleading impression of the facts related."[133]

Justice Frankfurter wrote:

> He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.

347 U.S. at 65. *See* Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).

[132]383 N.E.2d at 301 (citing Randolph v. State, 378 N.E.2d 828 (Ind. 1978); Baker v. State, 372 N.E.2d 1172 (Ind. 1978); Pearish v. State, 264 Ind. 339, 344 N.E.2d 296 (1976); Martin v. State, 261 Ind. 492, 306 N.E.2d 93 (1973); Roby v. State, 363 N.E.2d 1039 (Ind. Ct. App. 1977); McDonald v. State, 163 Ind. App. 667, 325 N.E.2d 862 (1975); Hannah v. State, 160 Ind. App. 317, 311 N.E.2d 838 (1974)).

[133]383 N.E.2d at 301.