# RECENT DEVELOPMENTS IN INDIANA EVIDENCE LAW

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Although the Indiana Rules of Evidence (Rules) became effective more than seven years ago, many aspects of those rules remain open to interpretation. Debate over the proper rule of evidence in a particular situation stems not only from interpreting the text of the Rules, but also from determining the proper influence of statutory and common law.

This Article explains many of the developments in Indiana evidence law during the period between October 1, 1999 and September 30, 2000. The discussion topics are grouped in the same subject order as the Indiana Rules of Evidence, followed by a few evidence topics not explicitly covered by the Rules.

## I. SCOPE OF THE RULES

According to Rule 101(a), the Rules apply to all Indiana court proceedings except where "otherwise required by the Constitution of the United States or Indiana, by the provisions of this rule, or by other rules promulgated by the Indiana Supreme Court."[1] In situations where the rules do not "cover a specific evidence issue, common or statutory law shall apply."[2] This leaves the applicability of the Rules open to debate.

The wording of Rule 101(a), requiring the application of statutory or common law in areas not covered by the rules, has been interpreted by the Indiana Supreme Court to mean that the rules trump any conflicting statute.[3]

## II. RELEVANCE

### *A. Admission of Photographic Evidence*

In *Cutter v. State*,[4] the appellant was convicted of murder, felony murder, criminal confinement and rape. Cutter argued on appeal that the trial court had erred by admitting an inflammatory photograph of the victim into evidence. The photograph in question was of the pathologist holding open the victim's vagina and was used to show the jury bruising of the victim's vagina. Cutter contended that he was prejudiced by introduction of the photograph and that it was irrelevant to any issue properly before the jury.[5]

Although the photograph was admitted into evidence without objection,[6] the

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1. IND. R. EVID. 101(a).

2. *Id.*

3. *See* Williams v. State, 681 N.E.2d 195, 200 n.6 (Ind. 1997); Humbert v. Smith, 664 N.E.2d 356, 357 (Ind. 1996).

4. 725 N.E.2d 401 (Ind. 2000).

5. *See id.* at 404-06.

6. The court noted that such failure to object usually results in "waiver and precludes

court reviewed the admission of the photograph for abuse of discretion.[7] Under Rule 403, "[a]lthough a photograph may arouse the passions of the jurors, it is admissible unless 'its probative value is substantially outweighed by the danger of unfair prejudice.'"[8]

The court decided that the photograph contained probative value for several purposes. The photograph was useful to show bruises that were relevant to the "by force" element of the rape charge; the photograph was relevant to the State's contention that the rape was of unusual force and accompanied by penetration of a fist-like object; and the photograph was relevant to the lay testimony of one of the State's witnesses.[9] While the court restated the rule that "autopsy photographs in which a pathologist distorts a victim's body parts are ordinarily objectionable," the distortion in this case was necessary due to the internal nature of the injuries in question.[10]

### *B. Improper Admission of Character Evidence*

In *Buchanan v. State*,[11] the appellant had been convicted for taking nude photographs of and having sex with a five-year-old child. On appeal, Buchanan raised several challenges, including a claim that the trial court abused its discretion by allowing into evidence pornographic photographs, drawings and magazines found in Buchanan's possession.[12]

Buchanan argued that admission of this evidence was erroneous "because its potential prejudicial effect on the jury outweighed any probative value and because the State improperly used the evidence to prove [his] character."[13] Rule 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[14] Additionally, the evidence must be relevant to a matter at issue other than the defendant's propensity to commit the crime. Even if found relevant, "the evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[15]

The pornographic material seized at Buchanan's home contained

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appellate review unless its admission constitutes fundamental error." *Id.* at 406 (citing Willey v. State, 712 N.E.2d 434, 444-45 (Ind. 1999)).

7. *See id.*

8. *Id.* (quoting IND. EVIDENCE RULE 403).

9. *See id.*

10. *Id.* (citing Allen v. State, 686 N.E.2d 760, 776 (Ind. 1997), *cert. denied*, 525 U.S. 1073 (1999)).

11. 742 N.E.2d 1018 (Ind. Ct. App. 2001).

12. *See id.* at 1020-21.

13. *Id.* at 1021.

14. IND. R. EVID. 404(b).

15. IND. R. EVID. 403.

"photographs of semi-nude children, drawings of nude children and the cover of a magazine entitled 'Little Girls,' which appear[ed] to depict an adult male engaging in intercourse with a child."[16] The State argued that this material was admissible to demonstrate Buchanan's plan and motive to molest the victim in this case.[17]

The court described the "plan exclusion" of Rule 404(b) as a test of "not whether the other offenses have certain elements in common with the charged crime, but whether the other offenses tend to establish a preconceived plan."[18] In other words, the crime must be "so related in character, time, and place of commission as to establish some plan which embraced both the prior and subsequent criminal activity and the charged crime."[19]

While the court found the seized evidence distasteful, it stated that possession of these items did not demonstrate that Buchanan had a plan to molest little girls. The court decided that because the evidence was not relevant to the existence of a plan, its admission was error. The court also decided that the photographs and drawings were not relevant evidence of a motive because they were not tied in any way to Buchanan's relationship with the victim.[20]

A second case addressing Rule 404(b) issues, *Pope v. State*,[21] involved a conviction for child exploitation and possession of child pornography stemming from electronic communications over the Internet. Pope was accused of assuming the screen name "Mnight", entering an Internet chat room, and sending child pornography to an undercover Cook County, Illinois, Sheriff Department officer. The officer had been posing as a thirteen year old girl (alias Nikki 13) on the Internet. Mnight electronically sent pornographic pictures of young girls to Nikki 13 and suggested they meet for sex.[22]

After arrangements for a meeting at an Illinois Holiday Inn were made, Pope arrived at the hotel, went to the arranged room and was detained by authorities. A search of Pope's home computer found approximately twenty-six photographs of children having sex or in explicit positions. On appeal, Pope argued that the evidence of the Holiday Inn meeting and his communications over the Internet were inadmissible evidence of other bad acts.[23]

While Rule 404(b) excludes evidence introduced to prove the "forbidden inference" of a defendant's propensity to commit the crime in question, evidence of uncharged misconduct that is "inextricably bound up" with the offense in

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16. *Buchanan*, 742 N.E.2d at 1022.

17. *See id.*

18. *Id.*

19. *Id.* at 1022 (citing Lannan v. State, 600 N.E.2d 1334, 1339 (Ind. 1992)).

20. *See id.* The court added that even if this evidence had demonstrated a common plan or motive, they would not pass the second (balancing) part of the 404(B) test. The court noted that the sheer volume of the pornographic material would be highly prejudicial, while the probative value would be minimal. *See id.* at 1022-23.

21. 740 N.E.2d 1247 (Ind. Ct. App. 2000).

22. *See id.* at 1249.

23. *See id.* at 1250.

question is admissible under Rule 404.[24] Pope's defense at trial was that someone else had sent the photographs without his knowledge. The court found that the testimony at trial describing the hotel meeting demonstrated that Pope's motive for sending the photographs was to entice Nikki 13 to have sex with him. The court also found that his actions at the Hotel were relevant to rebut his contention that he had never sent the photographs or met Nikki 13 on the Internet. Pope also argued that the evidence was highly prejudicial. However, the court found that it was highly probative in demonstrating that he was Mnight, the computer user who had sent the photographs and communicated with Nikki 13. Therefore, the court declined to find that the danger of unfair prejudice outweighed the probative value of the evidence.[25]

## III. IMPEACHMENT

### *A. Evidence of Prior Crimes for Witness Impeachment*

Rule 609(a) allows a party to use evidence that a witness has been convicted of certain crimes or attempts to commit certain crimes in order to attack the witness' credibility.[26] Since the adoption of the Rules, however, the Indiana Supreme Court had not considered whether a guilty plea not yet reduced to judgment could be counted as such a conviction.

Among the crimes enumerated in Rule 609(a) is that of criminal confinement.[27] In *Specht v. State*,[28] the appellant had been convicted of participating in a hold-up at a trial in which his earlier guilty plea to a confinement charge was used to impeach him even though that plea had not been reduced to judgment due to a deferred prosecution agreement. Specht argued that a guilty plea was not a "conviction" under Rule 609(a) because it had not been reduced to judgment.[29]

The supreme court noted that prior to the adoption of the Rules in 1994, such evidence could be used for impeachment purposes.[30] The court further noted that existing case law stated that "when there has been a plea of guilty it is a conviction of crime and the presumption of innocence no longer follows the defendant . . . . The fact that final judgment was not rendered does not alter the fact that he stands convicted of the crime to which he has entered a plea."[31] The court found that while the Rules superceded existing common law, Rule 609(a) preserved, rather than replaced, the case law regarding impeachment. The court noted that the committee responsible for drafting the Rules explicitly remarked

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24. *Id.* (citing Sanders v. State, 724 N.E.2d 1127, 1130-31 (Ind. Ct. App. 2000)).
25. *See id.* at 1251.
26. *See* IND. R. EVID. 609(a).
27. *See id.*
28. 734 N.E.2d 239 (Ind. 2000).
29. *See id.* at 240.
30. *See id.*
31. *Id.* (quoting McDaniel v. State, 375 N.E.2d 228, 230 (Ind. 1978)).

that "this section preserves prior Indiana Law."[32] Therefore, the court found that the existing common law rule that allows the use of a guilty plea not yet reduced to judgment to attack witness credibility survived the adoption of the Rules.[33]

### *B. Financial Interest Witness Bias*

Rule 616 states that "[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible."[34] In *Tucker v. State*,[35] Tucker challenged his conviction based on the fact that the trial court had granted a motion *in limine* forbidding Tucker from questioning a witness about whether the witness had reported the payment for his confidential informant activities on his taxes. The court of appeals held that this limitation did not substantially impair Tucker's ability to show bias because evidence of the informant's ties to police was presented at trial. The court reasoned that while failure to pay taxes might weigh on the informants' credibility as a witness, sufficient evidence was presented to allow the jury to infer bias from the informant's police ties. In the court's view, possible non-payment of taxes on the informant fee has little impact on how a witness will testify. Therefore, Tucker's conviction was affirmed.[36]

A similar case, *McCarthy v. State*,[37] involved a person convicted of two counts of sexual misconduct with a minor. On appeal, McCarthy argued that it was reversible error for the trial court to deny him the right to question the mother of one of the alleged victims who was a witness at trial about a notice of tort claim she had filed against the appellant's school-corporation employer. McCarthy argued that he should have been able to question the witness regarding bias in the form of a financial interest stemming from the tort claim. Because the jury was only "allowed to hear from the potentially sympathetic mother of an alleged victim, not the potential recipient of a financial settlement or award,"[38] the court of appeals agreed that the jury was unable to fairly judge the witness's credibility and granted McCarthy a new trial.[39] However, the Indiana Supreme Court vacated this decision by granting transfer, leaving this particular issue unsettled.[40]

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32. *Id.* (quoting INDIANA SUPREME COURT COMMITTEE ON THE ADOPTION OF THE INDIANA RULES OF EVIDENCE, PROPOSED INDIANA RULES OF EVIDENCE [AND COMMENTARY] 40 (1993)).

33. *See id.* at 240-41.

34. IND. R. EVID. 616. The right of confrontation of witnesses against a party is also granted under the Sixth Amendment. *See* U.S. CONST. amend. VI.

35. 728 N.E.2d 261 (Ind. Ct. App. 2000).

36. *See id.* at 262-63.

37. 726 N.E.2d 789 (Ind. Ct. App.), *vacated by* 735 N.E.2d 236 (Ind. 2000).

38. *Id.* at 793.

39. *See id.*

40. *See McCarthy*, 735 N.E.2d at 236.

### *C. Inquiry into Validity of a Verdict*

Rule 606(b) states that "[u]pon an inquiry into the validity of a verdict . . . a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations."[41] However, the Rule includes exceptions for testimony regarding drug or alcohol use by any juror, whether or not extraneous prejudicial information was brought to the attention of the jury, and whether any outside influence was improperly brought upon any juror.[42] *Griffin v State*[43] is the first case to address the specific exceptions contained in Rule 606(b).

At Griffin's trial, the final jury instructions included an instruction that an alternate juror would be allowed into the jury room in case the need for a replacement juror should arise, but that the alternate would not participate in any way during the deliberations. After his conviction, Griffin filed a motion to correct errors alleging that the alternate juror improperly influenced the jury.[44]

Griffin's theory was that the conduct of an alternate juror can amount to an improper outside influence on the jury as contemplated by Rule 606(b). The court of appeals disagreed, noting that a presumption exists that the alternate juror followed the instruction not to participate and that the jury members properly ignored any such interference. The court further noted that because juror affidavits are inadmissible, there could be no evidence of the alternate juror's conduct with which to impeach the verdict. Therefore, the court declined to overrule the trial court's denial of the motion to correct errors.[45] The court of appeals' decision, however, was vacated by the Indiana Supreme Court on January 17, 2001.

### *D. Prior Inconsistent Statements Used to Impeach on Collateral Matters*

Rule 613(b) states that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."[46] In *Jackson v. State*,[47] the appellant had been convicted of the shooting death of his wife. The police deputy, who was the first to arrive at the scene of the death, testified at trial that he did not recall telling the defendant's sister that he thought the shooting was an accident.[48]

Jackson argued on appeal that the trial court erred in refusing to allow

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41. IND. R. EVID. 606(b).

42. *See id.*

43. 735 N.E.2d 258 (Ind. Ct. App. 2000), *vacated by* No. 49S02-0101-CR-43, 2001 Ind. LEXIS 53, at *1 (Ind. Jan. 17, 2001).

44. *See id.* at 262-63.

45. *See id.* at 263-64 (citations omitted).

46. IND. R. EVID. 613(b).

47. 728 N.E.2d 147 (Ind. 2000).

48. *See id.* at 150, 152.

defense counsel to call the sister to testify for the purpose of impeaching the deputy's testimony with a prior inconsistent statement. The Indiana Supreme Court agreed with the State's contention that "whether or not [the deputy] had ever expressed the belief that the killing was accidental was a collateral matter."[49] The court held that, while impeachment on collateral matters had not been addressed since the adoption of the Rules, it saw no reason to "depart from the well established common law rule that this is barred."[50]

The court explained that the only inconsistency at issue was whether or not the deputy made the statement to the defendant's sister. The deputy could not testify as to his belief that the shooting was accidental or to the underlying fact that the shooting was accidental. Therefore, whether or not the deputy made this comment to the sister was collateral as well as irrelevant. Any testimony that the shooting was accidental would also be inadmissible because it would be an expression of intent barred by Rule 704(b).[51]

### *E. Interrogation by Juror*

Rule 614(d) allows jurors to propound questions to a witness by submitting them to the judge, who decides whether to submit the questions to the witness, subject to objections by the parties outside the presence of the jury.[52] In *Vinson v. State*,[53] a juror propounded a question after the State had rested its case. The trial court, over the defense's objections, reopened the case to address the juror's question. The juror's question concerning the whereabouts of a second possible culprit implied the juror had doubts over who was the actual perpetrator.[54] Defense counsel objected, stating that reopening the case for this purpose would "shift the burden and aide the prosecution in clearing up the reasonable doubt in the juror's minds."[55] The trial court overruled the objection and allowed the State to ask numerous questions of the witness concerning the other possible suspect. The Indiana Court of Appeals held that this was a proper use of Rule 614(d).[56]

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49. *Id.* at 153.

50. *Id.* (citing 13 ROBERT LOWELL MILLER, JR., INDIANA PRACTICE § 613.209 (2d ed. 1995)).

51. *See id.* "Witnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." IND. R. EVID. 704(b).

52. *See* IND. R. EVID. 614(d).

53. 735 N.E.2d 828 (Ind. Ct. App.), *trans. denied*, 741 N.E.2d 1260 (Ind. 2000).

54. *See id.* at 836.

55. *Id.*

56. *Id.* The defense also asked that reopening the case be limited to a single question, but the request was overruled by the trial court. The trial court stated that the issue was more complex than the simple location of the other possible perpetrator. The defense was allowed to cross-examine the witness on the new direct examination questions. *See id.*

In *Trotter v. State*,[57] the appellant had been convicted of theft and attempted fraud for trying to purchase items with a stolen credit card. At trial, the evidence against Trotter included the attempted credit transaction receipt, as well as a surveillance video of the attempted transaction. Following the admission of the evidence, a juror submitted a written question to the court, asking the security guard if the time of day indicators on the video and the sales receipt were identical.[58]

The trial judge discussed the issue with the parties out of the jury's presence. Defense counsel argued that the document spoke for itself, that the security guard was not a proper witness for this question, and that it went beyond the scope of the State's questioning. The objections were overruled by the court, and the guard was asked if he was familiar with timestamping. The parties were then allowed to question the guard on matters related to the juror's question. The guard testified that the times did not match on their faces because an electrical storm had reset the video system, but correcting for the reset, the times did match. Defense counsel then asked the court for a continuance to verify the testimony about the storm, but the request was denied.[59]

Trotter asserted on appeal that the question was not proper because it went beyond the evidence that the State had chosen to present. The court of appeals found no error, stating that the question was a proper one because it led to discovery of the truth. Trotter also argued that the question benefitted the State because it allowed the State to explain a discrepancy in the evidence against him. However, the court found no error, pointing out that in most cases where an answer to a question clarifies an issue, one of the parties will indeed benefit. The court further noted that to hold otherwise would infringe on the jury's fact-finding mission. The court clarified its statement, adding that not every juror question leading to the discovery of the truth must be allowed. According to the court, any such question must also meet the admissibility requirements of the Rules of Evidence.[60]

Trotter further argued that the trial judge improperly encroached on the prosecutor's duties and assumed an adversarial role by asking the witness a foundational question to determine the witness' qualifications to answer the juror's question. While the court found Rule 614(d) to be silent on this issue and found no previous cases discussing the appropriateness of judge questioning to decide whether to submit a juror question, it found no error. In support of this finding, the court noted that existing case law permits the trial court to ask questions where the answer is needed to rule intelligently on a matter if it is done in an impartial manner and does not influence the jury with the judge's personal contentions. The trial court's denial of Trotter's request for a continuance to investigate the witness's testimony regarding the storm resetting of the video

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57. 733 N.E.2d 527 (Ind. Ct. App. 2000), *trans. denied*, No. 49A02-0002-CR-78, 2001 Ind. LEXIS 22, at *1 (Ind. Jan. 11, 2001).

58. *See id.* at 529-30.

59. *See id.* at 530.

60. *See id.* at 531-32.

timestamping was also found not to be an abuse of discretion. The court of appeals said that Trotter had the opportunity to examine these materials and investigate discrepancies prior to trial; therefore, no continuance was necessary.[61]

### *F. Separation of Witnesses*

Rule 615 states that a court "shall order witnesses excluded so that they cannot hear the testimony of or discuss testimony with other witnesses."[62] The rule excludes parties and persons "whose presence is shown by a party to be essential to the presentation of the party's cause."[63]

In *Hernandez v. State*,[64] the appellant argued that the trial court committed reversible error by allowing the victim to stay seated at the prosecutor's table despite a valid order from the court for separation of witnesses. Prior to the adoption of the Rules, the decision to grant a separation of witnesses request was within the discretion of the trial court. Under the Rules, however, a trial court is required to grant a motion for separation of the witnesses. Hernandez contended that the State gained an unfair advantage because the victim was allowed to hear the testimony of thirteen other witnesses concerning his actions and the events leading up to the stabbing.[65]

In upholding the trial court's finding that the witness was an "essential witness" under Rule 615(3), the supreme court noted that the movant must demonstrate that the witness has special knowledge of the facts or has such specialized expertise that the party's attorney could not function effectively without the presence of the witness.[66] This test was met by the State's pre-trial showing that the witness was the only person with "personal knowledge of all the particulars of its case."[67] The court noted that the "typical exemption under Rule 615(3) involves an expert witness or case agent and not a 'fact and opinion witness;'"[68] however, this witness was indeed necessary and essential due to the defendant's theory of the case and long history with the witness.[69]

A similar claim of violation of a separation of witnesses order was raised in *Stafford v. State*.[70] Stafford had filed a motion for separation of witnesses to limit the investigating officers' presence in the courtroom. Stafford objected that allowing more than one police officer in the room violated Rule 615, which allows "an officer or employee of a party that is not a natural person" to remain

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61. *See id.* 532-33.
62. IND. R. EVID. 615.
63. *Id.*
64. 716 N.E.2d 948 (Ind. 1999).
65. *See id.* at 950.
66. *Id.*
67. *Id.* at 951.
68. *Id.* at 951 n.3 (citation omitted).
69. *See id.*
70. 736 N.E.2d 326 (Ind. Ct. App. 2000).

in the courtroom.[71] The court agreed with Stafford finding that the rule clearly contemplated *an* [singular] *officer*.[72] The proper method for approaching a violation of Rule 615 on appeal is to "presume prejudice, which presumption can be overcome if the non-movant can show there was no prejudice."[73] Here, the court found that Stafford had not been prejudiced by the presence of the two officers and declined to overturn the conviction on the basis of this error.[74]

The court went on to state that, while it was not done in this case, the two officers could have remained in the room by designation under separate exceptions to Rule 615. This could be accomplished by designating one officer as a party's designated representative and the other as an essential witness. The state of the law regarding Rule 615 may not be settled. A second Indiana Court of Appeals case, *Vinson v. State*,[75] held that more than one officer can remain in the courtroom under Rule 615's officer exception. The *Vinson* court stated that because both officers were assisting in the case, they both "clearly qualif[ied] for the second exemption from exclusion as provided in" Rule 615.[76] The *Vinson* court did not consider the wording of Rule 615 to mean that only one officer may fit under Rule 615's second exemption. In fact, the appellant had specifically claimed error because Rule 615 "allows only one officer . . . to remain in the courtroom during trial."[77] The court of appeals' disagreement over the proper interpretation of Rule 615 warrants monitoring by Indiana practitioners.

## IV. OPINIONS AND EXPERT TESTIMONY

### *A. Witnesses Not Testifying as Experts*

In *Vinson*, discussed above, Vinson claimed that the trial court erred in allowing an officer to testify that Vinson's clothing was the same as that of the perpetrator in a video surveillance tape.[78] The State argued on appeal that the officer's testimony was "permissible as opinion testimony by a lay witness."[79]

Rule 701 states that if the witness is not testifying as an expert, "the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination

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71. *Id.* at 329 (quoting IND. R. EVID. 615).

72. *See id.* at 330.

73. *Id.* at 331 (citing Hernandez v. State, 716 N.E.2d 948, 955 (Ind. 1999) (Boehm, J., dissenting)).

74. *See id.*

75. 735 N.E.2d 828 (Ind. Ct. App. 2000), *trans. denied*, 741 N.E.2d 1260 (Ind. 2000).

76. *Id.* at 831.

77. *Id.*

78. *See id.* at 835.

79. *Id.*

of a fact in issue."[80] In *Gibson v. State*,[81] the court of appeals found that no previous Indiana case had addressed the issue of allowing lay witness testimony by a non-eyewitness regarding the identity of a person depicted in a surveillance videotape. Because no precedent existed, and because Rule 701 is identical to Federal Rule of Evidence 701, the court looked to the Federal Rules of Evidence for guidance. This comparison led the *Gibson* court to permit such testimony under Rule 701 "as long as there is a basis for finding that the witness has superior ability to identify the defendant."[82] Along the same line of reasoning as *Gibson*, the *Vinson* court found no abuse of discretion by the trial court in letting the officer testify regarding his opinion of Vinson's identity on the videotape because he had viewed the video fifteen or twenty times. The multiple viewings allowed the trial court to conclude that the officer was more likely than the jury to identify Vinson from the video.[83]

In another case discussing Rule 701, *Cutter v. State*,[84] the murder and rape victim's partner, Long, testified at trial as to the unusual dilation of the victim's vagina. On appeal, Cutter argued that Long was not qualified as an expert witness to testify as to the matter of the unusual dilation of the victim's vagina. The supreme court held, however, that Long had testified as a lay witness, not an expert. Because Rule 701 allows a lay witness to testify in the form of opinions or inferences that are rationally based on perceptions and helpful to a clear understanding of the testimony or the determination of a fact in issue, the court found no error in allowing the testimony.[85] Long's testimony that the victim's vagina appeared larger than usual could have helped the jury draw an inference that penetration had occurred and was accomplished by force.[86]

### *B. Reliability of Scientific Principles Utilized by Expert Witnesses*

Rule 702 allows an expert witness to testify in the form of an opinion or otherwise if it "will assist the trier of fact to understand the evidence or determine a fact in issue," but such testimony is only admissible "if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable."[87]

In *Wallace v. Meadow Acres Manufactured Housing Inc.*,[88] the appellants sought to overturn the trial court's grant of summary judgment in favor of the appellees. The appellants had sued the manufacturer and seller of their mobile

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80. IND. R. EVID. 701.
81. 709 N.E.2d 11 (Ind. Ct. App. 1999).
82. *Id.* at 15.
83. *See Vinson*, 735 N.E.2d at 835.
84. 725 N.E.2d 401 (Ind. 2000).
85. *See id.* (citing IND. R. EVID. 701).
86. *See id.*
87. IND. R. EVID. 702.
88. 730 N.E.2d 809 (Ind. Ct. App. 2000), *trans. denied*, No. 02A03-9907-CV-265, 2001 Ind. LEXIS 124, at *1 (Ind. Feb. 5, 2001).

home claiming health problems stemming from excessive levels of formaldehyde. At trial, the appellants sought to introduce testimony from an expert witness as to the formaldehyde levels in the home on October 8, 1994, as well as the results of a special equation and extrapolation method for determining probable formaldehyde levels at the time of purchase in 1989.[89]

Appellants conceded that they could not prove causation without use of the special equation and the extrapolation formula needed to show formaldehyde concentrations at the time of purchase. The trial court allowed only the testimony regarding the actual levels found in the home. The trial court found that the special equation was an unreliable method and that the extrapolation method was based on a speculative decay rate not supported by scientific methods. Because the appellants could not show causation without the disallowed testimony, the trial court granted summary judgement to the appellees.[90]

The court of appeals noted that, while Rule 702 is not identical to Federal Rule of Evidence 702, the concerns driving the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[91] coincide with Rule 702's requirement that the trial court be satisfied of the reliability of the scientific principles.[92] The court further noted that "[w]hile these factors may be useful, 'there is no specific "test" or set of "prongs" which must be considered in order to satisfy Indiana Evidence Rule 702(b).'"[93]

At trial, the defense witness, Dr. Godish, was prepared to testify as to what the formaldehyde levels in the home would have been at a temperature of seventy-eight degrees, rather than the actual temperature of 71.5 degrees under which the samples were taken. In order to determine the formaldehyde levels, the witness employed the "Berge Equation," which purports to be a reliable predictor of formaldehyde levels measured under one condition and standardized to another.[94]

The issue raised by the appellants was that the trial court incorrectly required absolute scientific certainty instead of the simple reliability called for by Rule 702. Furthermore, the appellants argued that the trial court should have given greater weight to the witness's education, training, experience, and background, including the fact that he had extensively researched, tested, and published on the topic of formaldehyde.

The trial court found that this testimony by Dr. Godish would be unreliable because: (1) the witness failed to observe certain testing standards required by both his own article and established HUD standards; (2) there was no evidence that the method was generally accepted in the scientific community; and (3) the

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89. *See id.* at 811.

90. *See id.* at 812, 818.

91. 509 U.S. 579 (1993).

92. *See Wallace*, 730 N.E.2d at 813 (citing Steward v. State, 652 N.E.2d 490, 498 (Ind. 1995)).

93. *Id.* at 813 (quoting McGrew v. State, 682 N.E.2d 1289, 1292 (Ind. 1997)).

94. *See id.* at 814 (citation omitted).

witness testified that the Berge Equation by itself contained a minimum error rate of plus or minus twelve percent.[95]

The witness further wished to testify with respect to what the formaldehyde levels would have been at the time the home was purchased in 1989. This would have been accomplished by starting with the levels established by the Berge Equation and then extrapolating to 1989 by examining the half life or rate of decay of formaldehyde. Unfortunately for the appellants, the witness testified that this methodology would give a worst-case scenario result and that there are no scientific studies which establish a half-life or decay rate for formaldehyde.[96]

The *Wallace* case is significant because it dispelled the argument that opinion testimony from a distinguished expert can overcome unsupported scientific theory. The appellants in *Wallace* argued that great weight should be given to the witness's testimony concerning the reliability of the tests due to his expertise in formaldehyde. The court disagreed, stating that "[w]hile it is clearly helpful that Dr. Godish has previously researched and published in this area for litigation and research purposes, this factor alone is not determinative."[97] The failure of the appellants to demonstrate the reliability required by Rule 702 precluded use of the expert testimony.[98]

Another case making significant clarifications to rules on the use of expert testimony is *Doe v. Shults-Lewis Child & Family Service, Inc.*[99] The Indiana Supreme Court specifically stated that it granted transfer to clarify the role of expert opinion evidence in cases involving repressed memory of childhood sexual abuse and to clarify its decision in *Fager v. Hunt*,[100] in which it previously addressed the admissibility of expert opinion regarding repressed memories of childhood sexual abuse. In *Fager*, the court rejected the plaintiff's claim because she had not submitted "affidavits or depositions of qualified witnesses providing expert opinion to support the scientific validity of repressed memory and to establish that [plaintiff's] normal powers of perception and recollection had been obscured by the phenomenon."[101] The defendant in *Fager* claimed that the statute of limitations, which bars claims arising from childhood injuries unless brought within two years of reaching majority age, disallowed the plaintiff's claim.[102] The plaintiff argued for application of the discovery rule and the tolling of the statute of limitations, which would allow her complaint for injuries

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95. *See id.* at 815.

96. *See id.* at 816-17. The court noted that its decision in this case is consistent with a Third Circuit Court of Appeals decision where expert testimony was excluded because it was based on a speculative decay rate not supported by reliable scientific methods. *See* Heller v. Shaw Indus., Inc., 167 F.3d 146, 162 (3d Cir. 1999).

97. *Wallace*, 730 N.E.2d at 817 (citing Lytle v. Ford Motor Co., 696 N.E.2d 465, 474 (Ind. Ct. App. 1998)).

98. *See id.* In other words, no matter how smart you are, you can't make stuff up.

99. 718 N.E.2d 738 (Ind. 1999).

100. 610 N.E.2d 246 (Ind. 1993).

101. *Id.* at 252.

102. *See id.* at 251 (citing IND. CODE § 34-1-2-5 (repealed 1998)).

suffered during childhood to be timely filed. Instead, the court applied the doctrine of fraudulent concealment to estop the defendants from asserting the statute of limitations.[103]

In *Shults-Lewis*, the plaintiffs brought an action against the defendant children's home for damages due to sexual abuse suffered while the plaintiffs were in custody of the defendant as minors. The plaintiffs claimed to have uncovered repressed memories of the incidents several years after reaching adulthood. The court stated that even where an adult plaintiff bringing an action for childhood sexual abuse can substantiate fraudulent concealment allegations, the plaintiff still needs to present a valid excuse for delay in bringing the action.[104] It is at this point that "repressed memory comes into legal play."[105] Because repressed memory is a concept beyond the comprehension of the normal juror to understand, an expert witness is needed to explain the concept to the jury.[106]

The key issue for the court was whether the grant of summary judgment by the trial court was appropriate. The plaintiffs argued that the expert witness' affidavit claiming the plaintiffs had recovered repressed memories raised a genuine issue of material fact, making summary judgment inappropriate.[107] Interpreting both Rule 702(b) and *Fager*, the court ruled that "an expert opinion affidavit submitted in a summary judgment proceeding, in addition to asserting admissible facts upon which the opinion is based, must also state the reasoning or methodologies upon which it is based."[108] The court also held, "[t]he reliability of the scientific principles need not be established, but the trial court must be provided with enough information to proceed with . . . confidence that the principles used to form the opinion are reliable."[109] Using this standard, the court then found that the grant of summary judgment was inappropriate because the affidavit of the expert witness provided enough information to assure the trial court that the underlying principles were sound.[110]

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103. *See id.*

104. *See Shults-Lewis*, 718 N.E.2d at 748. A plaintiff's excuse for not bringing a timely action may be that the memory of the incidents was repressed or unavailable prior to the time the statute of limitations expired. *See id.*

105. *Id.*

106. *See id.*

107. *See id.* The expert witness, a clinical psychologist and associate professor who had treated several hundred survivors of childhood sexual abuse, based his opinion on an interview with the plaintiffs, his experience with other victims, and his analysis of results of a standardized personality test taken by the plaintiffs. *See id.*

108. *Id.* at 750.

109. *Id.* at 750-51.

110. *Id.* at 751.

## V. HEARSAY

In *Tardy v. State*,[111] Tardy had been convicted of possession of cocaine within one thousand feet of a public park. At trial, the State presented a surveyor's map with lines that represented the extent of the area within one thousand feet of the park. Tardy objected to the admission of the map into evidence, arguing that a typical map does not have one thousand foot radius markings. Nevertheless, the trial court admitted the map as a certified public record under Rule 803(8).[112]

On appeal, Tardy claimed that the alterations to the map constituted inadmissible hearsay. The court described hearsay as a "'statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'"[113] The court of appeals further noted that a statement can be an oral or written assertion and that "[h]earsay is inadmissible except as provided by law or by the rules of evidence."[114] The hearsay exception allowed by the trial court under Rule 803(8), provides an exception for "records and reports setting forth [the office or agency's] regularly conducted and regularly recorded activities."[115]

The court of appeals found that the radius lines had been added for the purpose of litigation, rather than drawn in the course of the surveyor's regular duties as required by 803(8). The court said, "[a]s altered, the map constitutes a written assertion offered to prove that 209 North Randolph Street was within 1,000 feet of Willard Park."[116] The court held that the map, as altered, was not a public record and, therfore, no longer contained the required trustworthiness to remain in the public records exception to hearsay. Nevertheless, the admission of the map into evidence was found to be harmless error. Although possession of cocaine within one thousand feed of a public park raises the criminal penalty to a Class B felony, a park ranger had also testified that he measured the distance with a reliable measuring wheel. Therefore, other evidence existed in the record to show that the crime took place within one thousand feet of a public park.[117]

## VI. AUTHENTICATION OF DOCUMENTS

Several recent cases have involved an appellant challenging the certification of documents admitted into evidence against him or her at trial. Rule 901(b)(10) provides that an item may be authenticated by any method provided the Indiana Supreme Court, statute, or state constitution.[118]

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111. 728 N.E.2d 904 (Ind. Ct. App. 2000).
112. *See id.* at 906.
113. *Id.* (quoting IND. R. EVID. 801(c)).
114. *Id.* at 907 (quoting IND. R. EVID. 802).
115. *Id.* (quoting IND. R. EVID 803(8)).
116. *Id.*
117. *See id.* at 907-08.
118. *See* IND. R. EVID. 901(b)(10).

In *Hernandez v. State*,[119] the appellant challenged a two-page probable cause affidavit containing a certification stamp and signature of the clerk on only the first page and a three page sentencing order containing a certification stamp and signature of the clerk on only the last page. The supreme court ruled that a seal of a public officer "having official duties in the district or political subdivision in which the record is kept" can authenticate an official record.[120] Moreover, the Indiana Supreme Court held that Indiana Trial Rule 44 does not require certification to take any particular form.[121] In deciding *Hernandez*, the court held that "the certification on a single 'page' of either challenged exhibit provided adequate certification for the entirety of each exhibit as the certification placement 'in no way caus[ed] confusion as to the authenticity of the paper."[122]

In *Kidd v. State*,[123] the State introduced three exhibits detailing Kidd's convictions and prior sentences in the State of Washington. All three exhibits consisted of eleven pages with a certification on a final, separate page by the deputy clerk of the court in which Kidd had been convicted.[124] Kidd claimed that the single certification in each exhibit, which did not reference all pages as being certified, was an insufficient certification of multi-page exhibits. Specifically, he claimed that the exhibits required "individualized authentication of each page [or] proper reference to the number of pages being certified so as to make them admissible."[125]

The court disagreed, noting that the facts in the *Hernandez* case were nearly identical to this case, although in *Kidd* the certified documents referred to other criminal proceedings. The documents in *Kidd* had numbered paragraphs, two of the documents had matching cause numbers on the first and last pages, and the third document was marked with an exclusive numerical designation on the first and last pages.[126] The court concluded that there was no error in admitting the documents; furthermore, the court restated the rule that certification on a single page of an official record is adequate for the entire exhibit absent confusion regarding the document's authenticity.[127]

## VII. EVIDENCE OUTSIDE THE RULES

### *A. Use of Non-Mirandized Confession at Probation Revocation Hearing*

In *Miranda v. Arizona*,[128] the United States Supreme Court held that

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119. 716 N.E.2d 948, 957 (Ind. 1999).
120. *Id.* (quoting IND. TRIAL RULE 44(A)(1)).
121. *See id.* at 951-52.
122. *Id.* at 952 (citation omitted).
123. 738 N.E.2d 1039, 1043 (Ind. 2000).
124. *See id.*
125. *Id.*
126. *See id.* at 1044.
127. *See id.* at 1043-44.
128. 384 U.S. 436, 467-69 (1996).

incriminating statements made while a defendant is in custody and subject to interrogation may not be admitted into evidence unless the defendant waives his Fifth Amendment rights. In *Grubb v. State*,[129] the Indiana Court of Appeals examined the question of whether or not this protection against self-incrimination extended to probation revocation hearings.

The appellant in *Grubb* had been convicted of burglary, had served part of his sentence, and was then placed on probation for the remainder of his sentence. As a condition of his probation, the appellant was ordered not to consume alcohol or to engage in any criminal activity. In addition to a traffic stop in which the appellant had been found to have consumed alcohol, the state received a report alleging that the appellant had molested two different children. These events prompted the State to file a petition to revoke Grubb's probation. Grubb's probation was revoked by the trial court after the introduction of videotaped testimony from the two children and a videotaped confession given by Grubb during a police interview following the molestation accusations. Grubb argued that his confession was taken in violation of *Miranda* and, therefore, should not have been admitted into evidence or used for any purpose.[130]

The court held that *Miranda* warnings were not required to be given as a prerequisite for admitting a confession into evidence at a probation revocation hearing.[131] The court reasoned that the protection against self-incrimination only applies in criminal cases and that previous courts have held that "a probation revocation hearing is in the nature of a civil action and is not to be equated with an adversarial criminal proceeding."[132]

The court in *Grubb* also relied on the logic of *Pennsylvania Board of Probation & Parole v. Scott*,[133] in which the United States Supreme Court refused to extend the Fourth Amendment's exclusionary rule to evidence in probationary hearings. The Supreme Court reasoned that since the exclusionary rule is only applicable where the deterrence benefits outweigh the substantial costs associated with the exclusionary rule, its protections should not be extended beyond criminal trials.[134] The *Grubb* court followed this logic by reasoning that "costs associated with excluding Grubb's statement are high while the deterrence effect on police misconduct of excluding the statement is minimal given the fact that the statement cannot be admitted against Grubb at a criminal trial on molestation charges."[135]

### *B. Use of Existing DNA Data*

Many questions of first impression have been raised by the relatively recent

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129. 734 N.E.2d 589, 591 (Ind. Ct. App. 2000).
130. *See id.* at 590-91.
131. *See id.* at 592-93.
132. *Id.* (citing Cox v. State, 706 N.E.2d 547, 550 (Ind. 1999)).
133. 524 U.S. 357, 363 (1998).
134. *See id.* at 363.
135. *Grubb*, 734 N.E.2d at 592.

advent of DNA evidence. The appellant in *Smith v. State*[136] raised such a question by claiming that the use of his DNA profile, created in a prior unrelated case, constituted an unreasonable warrantless seizure in violation of his U.S. and Indiana constitutional rights as well as section 10-1-9-8 of the Indiana Code. Smith had been arrested for and acquitted of rape in an unrelated case. The trial court had ordered DNA samples taken from Smith. A later computer check matched the DNA taken from Smith in the prior case to DNA recovered from a second rape. At trial, Smith moved to suppress the DNA evidence, but the trial court denied his motion.[137]

The court of appeals found that Smith failed to demonstrate how the State's conduct violated the Fourth Amendment. The Fourth Amendment does protect Smith's "privacy interest not to have the police invade his body and take a blood sample," except when authorized by search warrant or court order.[138] Here, however, Smith did not challenge the court order in the previous case in which the DNA sample was obtained. Instead, Smith challenged the use of the resulting record in the present case.[139]

This use of an existing DNA record was found not to be a violation of the Fourth Amendment. The court analogized the retention of DNA records after an acquittal to the retention of fingerprint records after an acquittal. Using this line of reasoning, the court held that "law enforcement agencies may retain validly obtained DNA samples for use in subsequent unrelated criminal investigations."[140]

In order to establish a claim under the Indiana Constitution, Smith needed to "'establish ownership, control, possession, or interest in either the premises searched or the property seized.'"[141] Because the property in question was a record created by the crime lab, Smith could show no possessory or other interest in the record itself. Therefore, Smith "lack[ed] standing to challenge the Crime Lab's use of its own record."[142]

Smith's final claim was that Indiana statutory law prevented the retention of his DNA record for later use. Indiana law authorizes the establishment of a database of "'DNA identification records for convicted criminals, crime scene specimens, unidentified missing persons and close biological relatives of missing persons.'"[143] Because the statute in question "does not expressly exclude records obtained from other sources," the court held that the existing case law permitting retention of similar records also extends to retention of DNA profiles.[144]

A different approach to the same issue was taken by the Indiana Court of

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136. 734 N.E.2d 706 (Ind. Ct. App. 2000).
137. *See id.* at 708.
138. *Id.* (citing Schmerber v. California, 384 U.S. 757, 770 (1966)).
139. *See id.* at 710.
140. *Id.*
141. *Id.* (quoting Peterson v. State, 674 N.E.2d 528, 534 (Ind. 1996)).
142. *Id.* at 711.
143. *Id.* (quoting IND. CODE § 10-1-9-8 (2000)).
144. *Id.*

Appeals a few months later in *Patterson v. State*.[145] In this case, Patterson had submitted a blood sample under court order during the investigation of a previous conviction for residential entry, which was used to conduct DNA testing. During investigation of a later, separate robbery and rape, police discovered DNA on broken glass at the scene that matched a new DNA test conducted using Patterson's earlier blood sample. Based in part on this evidence, Patterson was convicted of rape and burglary. Patterson argued on appeal that the police lacked probable cause and therefore should have obtained a search warrant on the basis that the second series of DNA tests were warrantless searches prohibited by the Fourth Amendment.[146]

The court noted that Indiana courts have recently recognized the U.S. Supreme Court's ruling that "the testing of biological samples is a search under the Fourth Amendment."[147] The court then analyzed whether a warrant was required to conduct the second series of DNA tests. In order to make this determination, the court used the Fourth Amendment explanation found in *State v. Overmyer*,[148] which states that the Fourth Amendment protects "people from unreasonable government intrusions into those areas of an individual's life in which he has a legitimate expectation of privacy."[149] The balancing test of *Wyoming v. Houghton*,[150] which calls for a comparison of the degree of intrusion on the individual's privacy with the promotion of legitimate governmental interests,[151] was used to analyze the need for a warrant.[152]

The court found that the second series of DNA tests did not involve "the invasion of Patterson's body nor the release of information unrelated to the performance of the . . . tests."[153] The court further determined that the State has a substantial interest under the Fourth Amendment in "promoting the use of DNA testing, not only in creating a database, but also in conducting criminal investigations and exonerating the innocent."[154] The court agreed with Patterson that the State had intruded on his privacy by conducting the second test, but that his privacy interest was outweighed by the State's interest in protecting its citizens.[155]

The court then separately analyzed whether Patterson had a reasonable expectation of privacy in a blood sample lawfully obtained, but later used in an unrelated criminal investigation. The court stated that no evidence in the record demonstrated Patterson had exhibited any expectation of privacy in the original

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145. 742 N.E.2d 4 (Ind. Ct. App. 2000).
146. *See id.* at 6-8.
147. *Id.* at 9.
148. 712 N.E.2d 506 (Ind. Ct. App. 1999).
149. *Id.* at 507.
150. 526 U.S. 295 (1999).
151. *See id.* at 299-300.
152. *See Patterson*, 742 N.E.2d at 9-11.
153. *Id.* at 9-10.
154. *Id.* at 11.
155. *See id.*

blood sample, that society was not prepared to recognize such a privacy interest as reasonable, and that because he became a convicted felon due to the earlier incident, he was already required by state law to provide a DNA sample for the state databank. The court concluded that since Patterson had no reasonable expectation of privacy in the blood sample, no Fourth Amendment protections were invoked.[156]

### *C. 'Use of Toxicological Tests Held by Third Parties*

The Indiana Supreme Court weighed in on an issue related to DNA testing in *Oman v. State*.[157] In this case, Oman, a firefighter, was involved in an accident while driving a firetruck to the scene of an emergency. Pursuant to a city ordinance, Oman was required to submit to a urine test following the accident. The city ordinance requiring the tests states that the results will remain confidential, but that disclosure will be made when "compelled by law or by judicial and administrative process."[158] An anonymous tip claimed that Oman's test results were positive, and the prosecutor issued a subpoena *duces tecum* ordering the testing lab to produce the results. On the basis of the results, Oman was charged with operating a vehicle with a controlled substance in his blood. Oman's motion to suppress his test results was denied, and he appealed.[159]

First, Oman challenged the ability of the prosecutor to issue a subpoena *duces tecum* without consulting a court.[160] In response, the court issued a new rule of criminal procedure that applies to all subsequent investigative subpoenas. The court held that "[a] prosecutor acting without a grand jury must first seek leave of court before issuing a subpoena *duces tecum* to a third party for the production of documentary evidence."[161] Unfortunately for Oman, the court in his case found no reversible error because this rule had not yet been enunciated and, furthermore, the requirements of the Fourth Amendment had been satisfied.[162]

To begin its Fourth Amendment analysis, the court referred to two United States Supreme Court decisions upholding the constitutionality of government employee testing programs.[163] These cases recognized a "'special needs'" departure from normal Fourth Amendment requirements for employees engaged in safety-sensitive tasks.[164] The cases stated that these programs were for administrative purposes and were not designed as a pretext for law enforcement

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156. *See id.*

157. 737 N.E.2d 1131 (Ind. 2000).

158. *Id.* at 1134.

159. *See id.* at 1133-34.

160. *See id.* at 1135-38.

161. *Id.* at 1138.

162. *See id.* at 1138 n.10.

163. *See id.* at 1142 (citing Nat'l Treasury Employees Union v. Von Rabb, 489 U.S. 656 (1989); Skinner v. Ry. Lab. Executives' Ass'n, 489 U.S. 602 (1989)).

164. *See id.* (citing *Von Rabb*, 489 U.S. at 665-66).

information gathering.[165]

Second, Oman argued, and the Indiana Court of Appeals agreed, that results of administrative, employer drug tests could never be used as a basis for criminal investigations or trials. The Indiana Supreme Court disagreed, making a distinction between prosecution for simply testing positive on random or pre-employment drug screens and those gathered in accident-triggered tests.[166]

Finally, Oman argued that he was compelled to submit to post-accident testing. The court dismissed this claim by stating that "[t]oxicological samples, however, are simply not evidence of a testimonial or communicative nature protected by the Fifth Amendment."[167] The supreme court added that Oman had agreed to post-accident drug testing as a condition of his employment and could have either sought employment elsewhere or taken the mandatory thirty-day suspension with possible termination in lieu of submitting to the toxicological testing. The court summarized this portion of its holding by stating, "the results of Oman's administrative drug test can be used in a criminal prosecution against him, but only if obtained by valid legal process externally initiated from the employment setting."[168]

### *D. Application of the Exclusionary Rule to Controlled Substance Excise Tax Searches*

In *Adams v. State*,[169] a police detective obtained a warrant to search safe deposit boxes belonging to Adams. The detective discovered cocaine in the boxes, but the warrant was determined to be invalid. The resulting evidence was suppressed because it was based on stale information that indicated possible marijuana possession. The day before the prosecutor dismissed the charges, the Indiana Department of Revenue issued a Jeopardy Tax Assessment Notice based on the illegally seized cocaine.[170]

A warrant was then issued to collect the civil tax debt for the cocaine under Indiana's Controlled Substance Excise Tax (CSET). During the ensuing search of Adams's home, more cocaine was discovered in the stove and in a bedroom drawer, for which Adams was subsequently prosecuted. Adams argued that the cocaine found during the tax warrant search should be suppressed under the fruit of the poisonous tree doctrine since the tax investigation stemmed from the original invalid warrant.[171]

The court of appeals noted that this was a case of first impression in Indiana. Because the Indiana Supreme Court had previously decided that assessment of

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165. *See id.*

166. *See id.* at 1143-44.

167. *Id.* at 1144.

168. *Id.* at 1146-47.

169. 726 N.E.2d 390 (Ind. Ct. App.), *vacated by* No. 49S04-0011-CR-627, 2000 Ind. LEXIS 1098, at *1 (Ind. Nov. 3, 2000).

170. *See id.* at 391-92.

171. *See id.* at 392-93.

the CSET invokes double jeopardy[172] and because of the criminal implications of this type of situation, the court extended the protection of Fourth Amendment analysis to CSET searches and seizures. Therefore, the court found that the exclusionary rule applied in this case, and the trial court should have granted Adams's motion to suppress.[173]

The State also argued in *Adams* that there was existing federal case law suggesting that the exclusionary rule does not apply to tax warrants.[174] In *United States v. Janis*,[175] the United States Supreme Court held that "the exclusionary rule precluding use of . . . suppressed evidence in the state criminal proceeding should not be extended to preclude its use by the IRS in subsequent tax collection proceedings."[176] The court of appeals rejected this argument and found that the facts of the present case were distinct.[177] The court noted that *Janis* contemplates the use of previously suppressed evidence in a tax proceeding, whereas Adams was faced with the subsequent use of the suppressed evidence to support additional criminal charges against him.[178] Another distinction was that *Janis* involved state-suppressed evidence later used by the federal Internal Revenue Service, while *Adams* involved only state actors. Moreover, in *Adams*, the criminal investigators had worked closely with the tax officials. The court stated that not extending the exclusionary rule to these cases would allow the State to illegally seize evidence and then use that evidence for subsequent tax proceedings.[179] As the Indiana Supreme Court has accepted transfer on this case, it bears monitoring by Indiana practitioners.

## CONCLUSION

Although these decisions answered many questions regarding interpretation of the Rules, many subjects remain open to interpretation. This is not surprising, given that the Rules have been in effect for less than a decade.

Interested practitioners and academians should continue to keep a close watch on developments in interpretation of the Rules. Their relatively recent promulgation, combined with gap-filling by common and statutory law, as well as the advent of new technologies (such as DNA record-keeping), which have not previously been considered under the Rules, make them easily susceptible to significant change by a single court decision or in a short amount of time.

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172. *See id.* at 393 (citing Bryant v. State, 660 N.E.2d 290 (Ind. 1995)).

173. *See id.* However, the court stated that this was a narrow decision, based on judicially determined illegal evidence. The court made no decision regarding cases where a prosecutor might first dismiss or fail to file charges because he realizes that the evidence would not survive a motion to suppress. *See id.* at 393 n.6.

174. *See id.* at 394.

175. 428 U.S. 433 (1976).

176. *Id.* at 454.

177. *Adams*, 726 N.E.2d at 394.

178. *See id.*

179. *See id.* at 395.