Chapter 8
Hearsay
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CHAPTER 8

HEARSAY EVIDENCE

I. RULE 801 - DEFINITIONS

A. OFFICIAL TEXT:

The following definitions apply under this Article:

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) is not made by the declarant while testifying at the trial or hearing; and

(2) is offered in evidence to prove the truth of the matter asserted.

(d) Statements that are Not Hearsay. Notwithstanding Rule 801(c), a statement is not hearsay if:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony, and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) is an identification of a person shortly after perceiving the person.

(2) *An Opposing Party's Statement*. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

B. HEARSAY DEFINITION - RULE 801

Rule 801 defines hearsay. An assertive statement which is offered for some purpose other than to prove the matter asserted is not hearsay, but the adverse party is entitled to a limiting instruction upon request. The trial court must determine whether a statement is or is not hearsay under Rule 801(d) before examining exceptions to the hearsay rule. Bacher v. State, 686 N.E.2d 791 (Ind. 1997). Testimony summarizing the content of an out-of-court statement is evidence of a "statement" for purposes of the hearsay rule and constitutes hearsay evidence in its classic form. Thornton v. State, 25 N.E.3d 800 (Ind. Ct. App. 2015).

When determining whether a statement is hearsay, the trial court should first determine whether the testimony described an out-of-court statement asserting a fact susceptible of being true or false. If not, the testimony does not contain hearsay and should be admitted. If it does contain an assertion of fact, the trial court must next consider the evidentiary purpose of the proffered statement. If the purpose is to prove the fact asserted, and the statement does not qualify under IRE 801(d), an objection should be sustained unless the statement fits in an exception to the hearsay rule. If the proponent of statement urges a purpose other than the proof of the fact asserted, the trial court must consider whether the fact to be proved under the suggested purpose is relevant and whether the danger of prejudice outweighs its probative value. If the fact is not relevant, or the danger of unfair prejudice substantially outweighs the probative value, the hearsay objection should be sustained. Craig v. State, 630 N.E.2d 207 (Ind. 1994).

PRACTICE POINTER: Evidence which would be admissible under the hearsay rules is not necessarily admissible over a state or federal constitutional objection based on the confrontation clause. "Exceptions to the hearsay exclusionary rule are not per se consistent with the State constitutional right to meet the witnesses face to face but must be separately tested." Brady v. State, 575 N.E.2d 981, 987 (Ind. 1991).

1. Is it a statement that may be true or false?

First, the court is to consider whether the challenged hearsay statement asserts a fact susceptible of being true or false. Mason v. State, 689 N.E.2d 1233, 1237 (Ind. 1997). If the statement contains no such assertion, it cannot be hearsay. Craig v. State, 630 N.E.2d 207, 210-11 (Ind. 1994).

Smith v. State, 114 N.E.3d 540 (Ind. Ct. App. 2019) (harmless error to admit police officer's hearsay testimony that no one at address defendant said he had been visiting knew him; officer did not repeat declarants' statement per se, but information he testified about could only have been obtained by statements made by out-of-court declarant).

Steen v. State, 987 N.E.2d 159 (Ind. Ct. App. 2013) (a declaration that is not capable of being true or false asserts nothing, and so cannot be a "statement" for purposes of the hearsay rule).

Carpenter v. State, 15 N.E.3d 1075 (Ind. Ct. App. 2014) (pieces of mail with defendant's name and address did not constitute hearsay, as mail made no factual assertion and thus could not have been admitted for truth of matters asserted; mail was used as

circumstantial evidence to prove defendant stored property at the address listed on the mail).

a. Requests, commands, questions, and instructions

True requests, commands, and questions are not assertions, and evidence regarding such utterances may come in because they are not offered for the truth of the facts asserted. Bustamante v. State, 557 N.E.2d 1313, 1317 (Ind. 1990).

Bustamante v. State, 557 N.E.2d 1313 (Ind. 1990) (in arson and murder case, letter written to mother from victim who died in fire asking for money was not hearsay because the statement is not susceptible of being true or false).

Phillips v. State, 25 N.E.3d 1284 (Ind. Ct. App. 2015) (warning labels on infant crib were directives or imperatives, instructing the crib's user to "never" do certain things while using the product; because these instructive statements do not assert facts susceptible of being true or false, they are not hearsay).

However, "the grammatical form of the utterance does not govern whether it fits the definition of hearsay." Lampitok v. State, 817 N.E.2d 630 (Ind. Ct. App. 2004) (*quoting* Carter v. State, 766 N.E.2d 377, 382 (Ind. 2002)). Verbal conduct intended to assert fact but phrased as question is capable of being "statement" for purposes of hearsay rule. Powell v. State, 714 N.E.2d 624 (Ind. 1999). If report of question or command in effect transmits questioner's claimed observations, need for cross examination is as great as if witness reported direct statement. Id.

Powell v. State, 714 N.E.2d 624 (Ind. 1999) (testimony that one of three men involved in shooting "said something about, what, you think we ain't got guns, too, or whatever" was hearsay and should have been excluded).

Baker v. State, 111 N.E.3d 1146 (Ind. Ct. App. 2018) (officer's testimony that he observed and heard another unidentified officer ask defendant "why he ran" was a question offered for the truth of the matter asserted and should not have been admitted into evidence).

Lampitok v. State, 817 N.E.2d 630 (Ind. Ct. App. 2004) (implicit in declarant's command or request to witness to find gun and dispose of it is a factual assertion that there was, in fact, a gun used in the course of the offense, which was a contested issue of fact at trial, and therefore constituted hearsay).

b. Non-verbal conduct

A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. Nonverbal conduct signals such as nodding, pointing a finger, waving hands, and sign language are obvious equivalents of assertions.

Hall v. State, 259 Ind. 131, 284 N.E.2d 758 (1972) (testimony that a witness pointed out a vehicle to police officer is hearsay).

Miles v. State, 777 N.E.2d 767 (Ind. Ct. App. 2002) (trial court improperly excluded caller ID box information, which is not hearsay because there is no out-of-court asserter; the caller ID box is based on computer-generated information and is not simply a repetition of prior recorded human input or observation).

Hughes v. State, 546 N.E.2d 1203 (Ind. 1989) (silence or an equivocal response to an assertion made by another, which would ordinarily be expected to be denied is a tacit admission).

Byrd v. State, 579 N.E.2d 457 (Ind. 1991) (witness was permitted to testify about two instances of victim's nonverbal conduct (huddling in corner and brushing tire tracks from snow); conduct amounted to non-assertive conduct, and therefore not hearsay).

Vaughn v. State, 13 N.E.3d 873 (Ind. Ct. App. 2014) (video showing defendant selling cocaine to informant showed conduct, and conduct is not an assertion).

PRACTICE POINTER: In Willis v. State, 318 N.E.2d 385 (Ind. Ct. App. 1974), the court held that a police officer's testimony that a woman pointed to the defendant was offered to show why police were investigating whether the defendant had pistol, and not to prove truth of woman's assertion. This holding is questioned by Craig v. State, 630 N.E.2d 207 (Ind. 1994), and its progeny requiring that the police investigation be at issue, and a weighing of the probative value and unfair prejudice created by the admission of the hearsay.

c. Intent of declarant irrelevant

Evidence of an out-of-court statement from which the jury could infer a fact at issue qualifies as hearsay. Stoddard v. State, 887 A.2d 564 (Md. 2005). The Court reasons that the intent of the declarant is irrelevant to a determination of whether the statement is hearsay when offered to prove the truth of an unintentional assertion. Id.

Stoddard v. State, 887 A.2d 564 (Md. 2005) (child's question, "is [the defendant] going to get me?" was offered to prove that the child had seen defendant attack another child, and thus, was inadmissible).

d. Foundation for non-assertive acts or statements

A statement which is not assertive (such as an imperative, exclamatory or interrogatory sentence) is not hearsay. Rule 801(a),(c); see Imwinkelried, *Evidentiary Foundations* 401 (9th ed. 2015). "If the proponent is going to offer evidence on the theory that it is a nonassertive statement, the foundation usually includes these elements:

(1) Where the statement was made.
(2) When the statement was made.
(3) Who was present.
(4) The tenor of the statement.
(5) In an offer of proof outside the jury's hearing, the proponent states that the tenor of the statement is nonassertive.

(6) In the same offer of proof, the proponent shows that the nonassertive statement is logically relevant to the material facts of consequence in the case.

Imwinkelried, *Evidentiary Foundations* 419 (9th ed. 2015).

PRACTICE POINTER: If the defendant lays a proper foundation for admission of evidence of a declarant's statement but the trial court excludes the testimony anyway, the defendant must make an adequate offer of proof or waive the issue. An offer of proof must be certain and must definitely state the facts sought to be proved, and must show the materiality, competency, and relevancy of the evidence offered.

2. For what evidentiary purpose is the statement offered?

Second, the court considers the evidentiary purpose for the statement. If the evidentiary purpose is to prove the fact asserted in the statement, and the statement is neither from a witness nor from a party as described in Evidence Rule 801(d) and none of the hearsay exceptions apply, the statement is hearsay, and a timely objection should be sustained. Mason v. State, 689 N.E.2d 1233, 1237 (Ind. 1997); Craig v. State, 630 N.E.2d 207, 210-211 (Ind.1994).

The focus in a hearsay analysis is neither on who made the statement, nor on when the statement was made. Rather, the key is whether the statement is being offered to prove the truth of the matter asserted therein. Sylvester v. State, 698 N.E.2d 1126, n.3 (Ind.1998). Statements not admitted to prove the truth of the matter asserted are not hearsay. At the request of a party, the jury should be admonished not to use the statement as proof of the matter asserted. Angleton v. State, 686 N.E.2d 803 (Ind.1997).

Three-part test for out-of-court statements not offered for truth: 1) Does the testimony or written evidence describe an out-of-court statement assert a fact susceptible of being true or false? 2) What is the evidentiary purpose of the proffered statement? 3) Is the fact to be proved under the suggested purpose for the statement relevant to some issue in the case, and does any danger or prejudice outweigh its probative value? Blount v. State, 22 N.E.3d 559, 566-67 (Ind. 2014).

Lehman v. State, 926 N.E.2d 35 (Ind. Ct. App. 2010), *trans. denied* (deceased confidential informant's statements taped during conversation with defendant were not hearsay because statement was designed to prompt defendant to speak, not to show the truth of the matter asserted in the deceased informant's statement).

Anderson v. State, 718 N.E.2d 1101 (Ind. 1999) (statements were not offered for the truth of the matter but to show the witness' concern about the victim and the witness' subsequent actions).

Williams v. State, 669 N.E.2d 956 (Ind. 1996) (statements of confidential informant in taped conversation with defendant were not admitted for truth of matter asserted but rather were made to prompt the defendant to speak).

Allen v. State, 686 N.E.2d 760 (Ind. 1997) (statements made by victim which are offered to show reasons why person acted in manner he/she did are not hearsay).

Phillips v. State, 25 N.E.3d 1284 (Ind. Ct. App. 2015) (no abuse of discretion in admitting warning labels on infant crib because statements on labels were directives, did not make assertions of fact and were offered to establish what information was presented and available to defendant when using the portable crib and her resultant state of mind).

Vaughn v. State, 13 N.E.3d 873 (Ind. Ct. App. 2014) (videos and still photographs showing controlled drug buy between confidential informant and defendant were not meant to be an assertion, but merely showed conduct; additionally, any testimony regarding videos by detective was not hearsay because it was testimony based on detective's personal observation and did not relay an out-of-court statement).

Richardson v. Calderon, 713 N.E.2d 856, 862 (Ind. Ct. App. 1999) ("A trial court errs in excluding on hearsay grounds newspaper articles where the articles are not offered into evidence to establish the truth of the matter asserted, but rather are properly offered to establish other facts or inferences."); see also Kucki v. State, 483 N.E.2d 788 (Ind.Ct.App.1985).

3. Is the statement relevant for a non-hearsay purpose and does its admission create unfair prejudice?

Third, if the proponent of the statement urges admission for a purpose other than to prove the matter asserted, the court should consider whether the fact to be proved is relevant to some issue in the case, and whether the danger of unfair prejudice that may result from its admission outweighs its probative value. Mason v. State, 689 N.E.2d 1233, 1237 (Ind. 1997); Craig v. State, 630 N.E.2d 207, 210-11 (Ind.1994). If the purported non-hearsay purpose is to prove an issue which is irrelevant, then the admission of the statement is error. Ealy v. State, 685 N.E.2d 1047, 1056 (Ind.1997).

Bonner v. State, 650 N.E.2d 1139, 1141 (Ind.1995) (error to admit out-of-court statements about defendant trafficking drugs made to police officers for purpose of showing propriety of police initiating and investigation; neither content of statements nor propriety of police decision to investigate was an issue at trial; admonishment to consider the statement only for purposes of police investigation did not cure harm).

Craig v. State, 630 N.E.2d 207 (Ind. 1994) (where content of report of mother concerning what child told her was not a contested issue, nor was the propriety of police investigation questioned, neither statement had any conceivable relevance apart from proving facts asserted in statements, and so were inadmissible hearsay).

C. EVIDENCE OFFERED FOR NON-HEARSAY PURPOSES UNDER 801(c)

A statement is not hearsay if it does not matter to the case if the statement is true or false. Anderson v. State, 718 N.E.2d 1101 (Ind. 1999).

1. Statements offered to show state of mind

If the truth of the statement is at issue, the statement is hearsay and may still be admissible under the then existing mental, emotional, or physical condition exception, Ind. R. Evid. 803(3).

a. Self-defense

Defendant's testimony as to what victim said to defendant during fight was not hearsay and was highly relevant to assessing defendant's claim of self-defense. The ultimate issue was the reasonableness of defendant's claimed belief that he was in danger until victim agreed to stop. Defendant could testify to his feelings, intent, and perceptions, and his actual belief that he was in imminent harm. Hirsch v. State, 697 N.E.2d 37, 41 (Ind.1998).

Shepard v. State, 451 N.E.2d 1118 (Ind. Ct. App. 1983) (trial court erred by excluding evidence of victim's threats made to the accused to show state of mind in self-defense case). See also Isaacs v. State, 659 N.E.2d 1036 (Ind. 1995).

b. Sudden heat/ passion

Statements made by a victim which are offered to show the reasons why a person acted in the way he or she did are not hearsay. The defendant had the right to show the effect the victim's statement had on him, and thus, creating sudden heat. Sylvester v. State, 698 N.E.2d 1126 (Ind. 1998).

Troutner v. State, 951 N.E.2d 603 (Ind. Ct. App. 2011) (in robbery case, trial court erred by excluding defense's offered testimony that a witness heard defendant call victim a "child molester" while beating him; the testimony was admissible for the non-hearsay purpose of showing that the defendant acted out of passion or impulse, and not with the intent to commit robbery. In light of all the other evidence in the case, however, the error was harmless).

c. Consent

Whited v. State, 645 N.E.2d 1138 (Ind. Ct. App. 1995) (trial court erred in excluding victim's statements on night of alleged sexual attack to show that defendant thought sex was consensual).

d. Victim's state of mind (relationship with defendant)

Even if a statement is offered to show a victim's state of mind, often fear of the defendant, or relationship with the defendant, the victim's state of mind or the relationship is rarely at issue in the case. Wrinkles v. State, 690 N.E.2d 1156 (Ind. 1997); Angleton v. State, 686 N.E.2d 803 (Ind. 1997); Smith v. State, 721 N.E.2d 213 (Ind. 1999); Jester v. State, 724 N.E.2d 235 (Ind. 2000). The victim's state of mind or relationship with the defendant can be put into issue by the defendant. Angleton v. State, 686 N.E.2d 803 (Ind.1997); Vehorn v. State, 717 N.E.2d 869 (Ind. 1999); Pierce v. State, 705 N.E.2d 173 (Ind. 1998). However, the State cannot bootstrap the admissibility of a

victim's hearsay statement by putting the victim's state of mind or relationship with the defendant into issue through the State's theory of motive. Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004); Willey v. State, 712 N.E.2d 434 (Ind. 1999); Bassett v. State, 795 N.E.2d 1050 (Ind. 2003).

For a more detailed review of the admissibility of statements showing a victim's state of mind, see this Chapter, *Hearsay Exceptions: Availability of declarant immaterial: Rule 803, Subsection B.3*.

> Komyatti v. State, 490 N.E.2d 279 (Ind. 1986) (testimony regarding the reason the victim changed her will was hearsay and not admissible as probative of attorney's reason for changing the will or as evidence of victim's state of mind; where the victim's state of mind is irrelevant to issues in the case, a victim's state of mind cannot be justified to prove the truth of the matter asserted when the matter asserted is not relevant to the issues of the case).

PRACTICE POINTER: Older cases, such as Hughes v. State, 546 N.E.2d 1203 (Ind. 1989) and Carter v. State, 490 N.E.2d 288 (Ind. 1986), hold that statements of victims are not hearsay and are admissible to show the victim's state of mind and relationship with the defendant, but do not address the relevancy issues. These holdings arguably are questioned by the above cases.

2. Statements to show course of police investigation

Prosecutors often respond to defendants' hearsay objections by claiming that testimony is offered to 'show the course of the investigation' and not for a hearsay purpose. Indiana appellate courts have been suspicious of "course-of-the-investigation" evidence. While the need for this type of evidence is slight, the likelihood of misuse is great. Kindred v. State, 973 N.E.2d 1245, 1253 (Ind. Ct. App. 2012).

a. Course-of-investigation testimony is often objectionable because it is irrelevant

"[C]ases abound in which the officer is allowed to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports, on the ground that he was entitled to give the information upon which he acted." Kindred v. State, 973 N.E.2d 1245, 1253 (Ind. Ct. App. 2012), *quoting* 2 *McCormick on Evidence* § 249 (4th ed. 1992) (Testimony that a detective generally requires corroborating evidence before filing charges is irrelevant and potentially prejudicial; it does not make it more or less probable that the defendant committed the acts alleged.)

> Craig v. State, 630 N.E.2d 207, 212 (Ind. 1994) (State argued that police testimony, that victim's mother made a statement that the victim told her he had been molested, was not offered to prove the truth of the matter asserted but only to show the course of the investigation; Indiana Supreme Court disagreed, holding that the only "conceivable relevance" was to prove the facts asserted in the statements; propriety of police investigation was not questioned).

If the State is trying to admit hearsay allegedly to prove the course of investigation, the course of the investigation must be a contested issue under Indiana Rule of Evidence 401

and must have probative value that outweighs any risk of unfair prejudice under Indiana Rule of Evidence 403. Ortiz v. State, 741 N.E.2d 1203 (Ind. 2001); Maxey v. State, 730 N.E.2d 158 (Ind. 2000).

(1) Course of investigation must be relevant

Before approving admission of the informant's tips, trial court must find that the police investigation is relevant to any contested issue at trial. Mason v. State, 689 N.E.2d 1233, 1236 (Ind. 1997). The possibility the jury may wonder why police pursued a particular path does not, without more, make course-of-investigation testimony relevant. Blount v. State, 22 N.E.3d 559, 565 (Ind. 2014).

Ortiz v. State, 741 N.E.2d 1203 (Ind. 2001) (because the State failed to explain how steps of police investigation were relevant to contested issue at trial, admission of hearsay was error).

Mason v. State, 689 N.E.2d 1233, 1236 (Ind. 1997) (where defendant's defense was that he was merely a drug user and not dealer, the police investigation, and thus the informant's tip, were not relevant to any contested issue).

Corbally v. State, 5 N.E.3d 463 (Ind. Ct. App. 2014) (police investigator's testimony relating complaining witness's prior consistent hearsay statements, offered to counteract defendant's contention that police acted too hastily in apprehending him, was entirely irrelevant to the course of the investigation and not admissible).

Blount v. State, 22 N.E.3d 559 (Ind. 2014) (defendant's girlfriend's hearsay statement to officer providing the nickname of the shooter was erroneously admitted to show the course of investigation).

Headlee v. State, 678 N.E.2d 823 (Ind. Ct. App. 1997) (hearsay testimony that confidential informant had given the defendant cocaine in exchange for legal services in past was unnecessary to prove to course of investigation because the reason for the investigation into the defendant was explained through other evidence).

Jones v. Basinger, 635 F.3d 1030 (7th Cir. 2011) (state court unreasonably applied Crawford in determining that the government's use of out-of-court informant statements fell within the "course of investigation" theory).

J.L. v. State, 599 N.E.2d 208 (Ind. Ct. App. 1992) (trial court erred in allowing officer to testify as to statements made to him by CI who was not present or testifying at proceeding; officer testified that CI said that after he exchanged money with driver of car, passenger opened false bottom of the can on his side of car and gave driver five packets of crack cocaine; this statement had no bearing on the course of investigation and constituted reversible error; Cf. Bates-Smith v. State, 108 N.E.3d 399 (Ind. Ct. App. 2018) (holding an informant's statements to a detective were not offered for the truth of the matter asserted but to show the reason the officers stopped defendant's vehicle).

Patton v. State, 725 N.E.2d 462 (Ind. Ct. App. 2000) (statement that "he was in convenience store" were not hearsay but were relevant to explain why officer changed his course of action from approaching his squad car to leave premises and end investigation to walking to the back of the store to continue investigating; further, the statement was not specific to defendant).

Nuerge v. State, 677 N.E.2d 1043 (Ind. Ct. App. 1997) (counsel was not ineffective for failing to object to investigating officer's testimony that he talked with alleged victim's mother, and she stated that allegations of molestation were true as far as she was concerned; officer's testimony was not offered to prove truth of matter asserted but was offered to set foundation of officer's involvement in case). See also Steward v. State, 636 N.E.2d 143 (Ind. Ct. App. 1994).

McKeller v. State, 620 N.E.2d 744 (Ind. Ct. App. 1993) (hearsay rule did not prevent officer from testifying as to third party's statement that coat and gun belonged to the defendant; the record indicated that testimony was used to explain why the officers took the coat from the door handle and patted it down when arresting the defendant).

b. Fact that police received tip

Evidence that the police received a tip is not hearsay when neither the informant's name nor the tip's content is revealed to the jury. Mason v. State, 689 N.E.2d 1233, 1236, n.5 (Ind. 1997).

c. Content of tip

The content of an informant's tip should not be communicated to the jury as evidence that the fact asserted therein is true, but may, on occasion, be admitted to for other relevant purposes, such as explaining the police investigation. Mason v. State, 689 N.E.2d 1233, 1236 (Ind. 1997). Courts have long recognized, even before the adoption of the Rules of Evidence, that the better rule is to allow the admission of the fact of complaint or tip but prohibit the admission of the content of complaint or tip unless the content is necessary to explain why or how officers proceeded. Touchstone v. State, 618 N.E.2d 48 (Ind. Ct. App. 1993).

(1) Potential for prejudice is great

The harm caused by the admission of out-of-court statement alleged to prove the course of police investigation when the police investigation is not at issue may be so great that it cannot be cured by an admonishment. Bonner v. State, 650 N.E.2d 1139 (Ind.1995); Williams v. State, 544 N.E.2d 161 (Ind. 1989); Headlee v. State, 678 N.E.2d 823 (Ind. Ct. App. 1997).

Mason v. State, 689 N.E.2d 1233 (Ind. 1997) (the informant's tip created an unacceptable risk that jury might have treated informant's statements as evidence that defendant was dealing heroin). See also O'Grady v. State, 481 N.E.2d 115

(Ind. Ct. App. 1985), *disapproved on other grounds by* Wright v. State, 658 N.E.2d 563 (Ind. 1995).

Hernandez v. State, 785 N.E.2d 294 (Ind. Ct. App. 2003) (police officer's testimony that investigation begun due to complaints about defendant's prostitution activity was highly prejudicial in prostitution case and not relevant to contested issue in case); see also Thrash v. State, 88 N.E.3d 198 (Ind. Ct. App. 2017).

Robinson v. State, 634 N.E.2d 1367 (Ind. Ct. App. 1994) (although in drug trial where entrapment was raised, statement of CI restating another's belief that the defendant had been involved in prior drug transaction was hearsay, error did not require reversal because there was substantial independent evidence to establish the defendant's predisposition to deliver illegal drugs). See also Maxey v. State, 730 N.E.2d 158 (Ind. 2000); Winbush v. State, 776 N.E.2d 1219 (Ind. Ct. App. 2002).

3. Correct misleading impression

The "door-opening principle" has been described as "a substantive principle of evidence that dictates what material is relevant and admissible in a case" and "requires a trial court to determine whether one party's evidence and arguments, in the context of the full record, have created a 'misleading impression' that requires correction with additional material from the other side." See Hemphill v. New York, 595 U.S. ——, 142 S. Ct. 681, 691 (2022). But "[t]he Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court." Id. at 694. In Hemphill, the U.S. Supreme Court weighed whether the accused's theory of defense could "open the door" to otherwise inadmissible out-of-court testimonial hearsay that was never subjected to cross-examination. Rejecting the State's proffered "opening the door" exception, the Court held a defendant's Sixth Amendment right to confrontation does not give way simply because the State has evidence responsive to the theory of defense. In this case, the defendant's right to confront the witnesses against him in a murder trial was violated by the admission of unconfronted testimonial hearsay in the form of a third party's plea allocution as evidence to rebut the defendant's theory that the third party committed murder, on the view that it was reasonably necessary to correct defendant's misleading argument that the third party possessed a handgun consistent with the murder weapon.

Before Hempill, Indiana cases required a "clear and intentional" waiver o open the door to admission of testimonial evidence otherwise barred by the Confrontation Clause. The continued viability of this line of cases remains unclear in light of Hemphill.

Lane v. State, 997 N.E.2d 83 (Ind. Ct. App. 2013) (trial court erred in concluding that defendant opened the door to admission of hearsay evidence linking him to phone number one of victims used on night of shooting).

Kelley v. State, 555 N.E.2d 1341 (Ind. Ct. App. 1990) (questioning informant's reliability on cross of officer by discussing his flight from police did not create a misleading impression that would permit informant's hearsay statements into evidence; further, the State put the CI's credibility into issue).

Garcia-Berrios v. State, 147 N.E.3d 339 (Ind. Ct. App. 2020) (defendant opened the door to detective's hearsay testimony linking defendant to homicide scene by questioning him about eliminating other suspects); see also Cornell v. State, 139 N.E.3d 1135 (Ind. Ct. App. 2020).

4. Basis of expert's opinion

Indiana Rule of Evidence 703 allows experts to base their opinions on hearsay reasonably relied upon by experts in the field. However, when hearsay relayed to the expert was not part of the basis of the expert's opinion, the hearsay is inadmissible.

Miller v. State, 575 N.E.2d 272 (Ind. 1991) (one physician testified that another physician, who did not testify at trial, told him over telephone that he had treated defendant's girlfriend for same sexually transmitted disease that testifying physician diagnosed; this was classic hearsay because it was not used as basis of testifying physician's opinion, but was simply relating another's statement as conclusory answer to ultimate fact at issue).

5. Statements to impeach and rehabilitate

When prior statements are used to impeach or rehabilitate a witness, they are not hearsay because they are not used to prove the truth of the matter asserted. Birdsong v. State, 685 N.E.2d 42 (Ind. 1997). Once a witness has been impeached on cross-examination by reference to a prior inconsistent written statement, a party may rehabilitate its witness on redirect by introducing other pertinent portions of statement. Id.

Grund v. State, 671 N.E.2d 411 (Ind. 1996) (hearsay statements of defendant's family were not hearsay because they were offered to show that defendant tried to coerce his family into changing story).

Fox v. State, 497 N.E.2d 221 (Ind. 1986) (in pre-evidence rules case, state witness' testimony that threats against his family led him to make prior inconsistent statement re his identification of the defendant was hearsay, properly admitted for limited purpose of establishing witness' state of mind at time he made prior statement).

D. RULE 801(d) NONHEARSAY STATEMENTS

Federal courts have held that hearsay foundations must be found by a preponderance of the evidence. Bourjaily v. U.S., 483 U.S. 171, 107 S. Ct. 2775 (1987).

1. Prior statements by witnesses who also testify at trial- 801(d)(1)

A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or (B) consistent with the declarant's testimony, offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a

recent improper influence or motive in so testifying; or (C) an identification of a person shortly after perceiving the person. Indiana Rule of Evidence 801(d)(1).

a. General requirements under for 801(d)(1)(A)-(C)

Rule 801(d)(1) does not violate the federal or state constitutional rights to cross-examination because it applies only to prior statements of witnesses who testify and are subject to cross-examination about the prior statement. Clark v. State, 808 N.E.2d 1183, 1189-90 (Ind. 2004).

(1) Witness must testify at trial or hearing

Although Indiana Rule of Evidence 801(d)(1) states that the declarant must have testified at a trial or hearing, the courts have held that testimony from prior trials or depositions may satisfy this requirement if the defendant was given an opportunity to cross concerning the prior statement.

> Brown v. State, 671 N.E.2d 401 (Ind. 1996) (where the witness' testimony in a first trial is being offered in the second trial because the witness is unavailable, the first trial testimony is a sufficient opportunity to cross concerning a prior consistent statement if the defendant had an opportunity to cross examine the witness about the statement in the first trial).

(2) Statement must be subject to cross-examination

In order to satisfy the foundation elements of 801(d)(1), the declarant must be available for cross-examination about the prior statement or at least continue to be available for cross-examination after the introduction of the prior statement. Goodner v. State, 714 N.E.2d 638, 644 (Ind. 1999). A party has no burden of cross-examining a defendant about a matter that the State had not broached on direct examination. Muncy v. State, 716 N.E.2d 587 (Ind. Ct. App. 1999).

(a) Memory loss or denial of statement

Before a prior statement may be used as substantive evidence, under Indiana and federal case law, the witness must acknowledge making the prior statement. Because a witness who does not have memory of having a conversation cannot be crossed, a prior statement may not be used as substantive evidence if the declarant (1) denies making the statement or (2) denies memory of making the statement. See, e.g., Brown v. State, 671 N.E.2d 401, 406-07 (Ind. 1996). The trial court has discretion under Rule 104(a) to determine whether a declarant truly remembers making the statement despite a denial.

> But see Robinson v. State, 682 N.E.2d 806 (Ind. Ct. App. 1997) (trial court properly allowed witness' prior identification of the defendant to be admitted despite the fact that the witness denied making the prior identification).

However, where the witness does not deny making statements but does not remember exactly what was said, the witness is deemed available for cross-

examination regarding those statements as required for their admissibility. Id; see U.S. v. Owens, 484 U.S. 554, 108 S. Ct. 838, 98 L.Ed.2d 951 (1988).

The declarant's memory loss does not make her unavailable for cross-examination. The effect produced by declarant's assertion of memory loss was often the very result sought to be elicited on cross examination and could be effective in destroying the force of the prior statement, so admission of the statement did not deny the right to confrontation. Brim v. State, 624 N.E.2d 27 (Ind. Ct. App. 1993).

(b) Witness already called and released

A prior statement may be admitted when the declarant is not on the stand as long as the declarant is subject to cross examination concerning the statement at some point in the proceedings. Goodner v. State, 714 N.E.2d 638, 643 n.2 (Ind. 1999). Thus, if the declarant has already testified and has not been cross-examined on the statement, his availability to be recalled for cross-examination satisfies the requirement that he is subject to cross examination. Id. at 643 (implicitly overruling the statement in Moran v. State, 604 N.E.2d 1258, 1261 (Ind. Ct. App. 1992), that once the witness has left the stand and is not in the courtroom, he is unavailable for cross-examination and his prior statements are no longer admissible). Without a showing that the cross-examiner is unable to recall the witness, the ability to recall is sufficient to satisfy the opportunity to cross examine. See, e.g., Goodner, 714 N.E.2d at 644. However, the courts seem to take a case-by-case approach when determining whether a declarant who has been released from subpoena is still available.

> Muncy v. State, 716 N.E.2d 587 (Ind. Ct. App. 1999) (defendant's substantial rights were violated when the State was allowed to have an officer testify to the co-defendant's previous identification of the defendant as part of robbery after co-defendant had already testified for the State, was released, left the building and was not asked about identification; the defendant did not have an opportunity to cross-examine the co-defendant about his out-of-court identification of the defendant, and thus, the hearsay was not admissible under 801(d)(1)(C)).
>
> Moran v. State, 604 N.E.2d 1258 (Ind. Ct. App. 1992) (evidence of child molest victim's prior consistent statements to social workers, offered after victim had testified and had been excused and was no longer available for cross-examination, constituted inadmissible hearsay offered only to bolster victim's credibility).

But see:

> Norris v. State, 53 N.E.3d 512 (Ind. Ct. App. 2016) (no fundamental error or "drumbeat of repetition" by letting two witnesses testify about matters related to child's abuse where child's videotaped statement was played after the witness testified; testimony confirmed but did not elaborate on child's statement nor embellish the child's allegations).

Marshall v. State, 643 N.E.2d 957 (Ind. Ct. App. 1994) (where the State called a witness to testify to victim's prior consistent statements after the victim had testified, the defendant had the opportunity to cross the victim about the statements being there was no evidence that the defendant was unable to recall the witness).

Kielblock v. State, 627 N.E.2d 816 (Ind. Ct. App. 1994) (distinguishing Moran on basis that victim who had left the stand was still subject to being recalled because she was still under subpoena).

Ridenour v. State, 639 N.E.2d 288 (Ind. Ct. App. 1994) (distinguished Moran because, even though statements were admitted after witnesses were excused, both witnesses testified that they had given statements containing essentially same information as that testified to at trial; thus, the defendant had the opportunity to cross examine witnesses about statements when they were on stand and chose not to do so).

b. Rule 801(d)(1)(A)- Prior inconsistent statements

(1) Prior statement must have been made under oath

The requirement that the prior inconsistent statement must have been made under oath provides another important safeguard. Modesitt v. State, 578 N.E.2d 649, 653 (Ind.1991). Rule 801(d)(1)(A) does not apply to prior statements not made under oath. However, such statements may be admissible to impeach. Humphrey v. State, 680 N.E.2d 836, 837-38 (Ind. 1997), *post-conviction relief granted*, 73 N.E.3d 677 (Ind. 2017); Moss v. State, 13 N.E.3d 440, 446 (Ind. Ct. App. 2014). Prior statements used to impeach or rehabilitate a witness are not hearsay if they are not used to prove the truth of the matter asserted. Birdsong v. State, 685 N.E.2d 42, 46 (Ind. 1997); Humphrey v. State, 680 N.E.2d 836, 838-39 (Ind. 1997), *post-conviction relief granted*, 73 N.E.3d 677 (Ind. 2017).

See Rule 613 for a discussion of the use of prior inconsistent statements for impeachment purposes.

(2) Jury admonishment

If a party fails to object at trial to the use of a prior unsworn inconsistent statement for hearsay purposes or to request a limiting instruction, the finder of fact may consider the hearsay as substantive evidence. Humphrey v. State, 680 N.E.2d 836, 840 (Ind.1997), *post-conviction relief granted*, 73 N.E.3d 677 (Ind. 2017); Grove v. State, 449 N.E.2d 1122 (Ind. Ct. App. 1983).

PRACTICE POINTER: When the opposing party offers a prior inconsistent statement to impeach a witness, counsel should ask the court to admonish the jury not to consider the statement for the truth of the matter asserted (substantive purpose), but for the limited purpose of showing that the witness's credibility is diminished because the witness has given differing accounts of what happened. If counsel fails to request a limiting admonition and jury instruction, the issue is waived on appeal. See Rule 105.

Watch out for the following erroneous 'un-limiting' jury instruction:

"Prior inconsistent statements may be considered by you for two purposes. You may use them to impeach the capacity for truthfulness of the witness who made the inconsistent statements. You may also consider the out-of-court statements as evidence in determining the guilt or innocence of the defendant of the crime charged."

This instruction does not reflect current law and should not be used. Hirsch v. State, 697 N.E.2d 37 (Ind.1998); Humphrey v. State, 680 N.E.2d 836 (Ind. 1997), *post-conviction relief granted*, 73 N.E.3d 677 (Ind. 2017).

c. Rule 801(d)(1)(B) - Prior consistent statements offered to rebut charge of recent fabrication or improper influence

At one time, prior statements made by witnesses who were available to testify in court under oath were excepted from hearsay. Cooley v. State, 682 N.E.2d 1277 (Ind. 1997) (*citing* Patterson v. State, 324 N.E.2d 482 (Ind. 1975)). In 1991, after recognizing many concerns brought about by application of the Patterson doctrine, the Indiana Supreme Court abandoned the Patterson Rule and adopted Fed. Rule 801(d), which applies to prior statements by witnesses. Modisett v. State, 578 N.E.2d 649 (Ind. 1991). Federal Rule 801(d) is identical to Indiana Rule of Evidence 801(d)(1)(A).

An express or implied charge of recent fabrication or improper influence triggers the adversary's opportunity to present a prior consistent statement as substantive evidence. Townsend v. State, 33 N.E.3d 367, 370 (Ind. Ct. App. 2015).

(1) Declarant must be accused of recent fabrication, and not merely impeached

To require a judge to admit all records purporting to be prior consistent statements when a party minimally impeaches a witness and when there is no clear charge of recent fabrication or improper motive would undermine the very purpose of excluding prior consistent statements. Horan v. State, 682 N.E.2d 502, 511-12 (Ind.1997). Where a party goes beyond merely impeaching a witness's credibility, and implicitly charges the witness with recent fabrication, the adversary is entitled to present prior consistent testimony as substantive evidence. Counsel's intent is irrelevant if the inference of recent fabrication fairly arises from the line of questioning. Id.

Horan v. State, 682 N.E.2d 502 (Ind.1997) (trial court did not abuse discretion in finding that defendant's cross of State's witness on fact that state provided food, lodging and transportation during trial raised inference of recent motive to fabricate and thus, permitted admission of prior consistent statements).

Corbally v. State, 5 N.E.3d 463, 469 (Ind. Ct. App. 2014) (general attack on complaining witness's credibility and ability to accurately identify her assailant

did not permit State to "bolster" C.W.'s testimony by introduction of her prior consistent statements).

Lovitt v. State, 916 N.E.2d 1040 (Ind. Ct. App. 2009) (State did not imply that defendant's girlfriend fabricated her testimony by merely questioning her ability to recall events because of her consumption of alcohol).

Thomas v. State, 749 N.E.2d 1231 (Ind. Ct. App. 2001) (declining to hold that every cross concerning a lapse of memory by a witness amounts to a recent charge of fabrication under IRE 801(d)).

Townsend v. State, 33 N.E.3d 367 (Ind. Ct. App. 2015) (phone calls consistent with victim's trial testimony should not have been admitted but error was harmless; there was no allegation victim fabricated her testimony, so criteria for admission under Rule 801(d)(1)(B) were not met and the statements were inadmissible hearsay).

Bassett v. State, 895 N.E.2d 1201, 1213-14 (Ind. 2008) (witness's prior consistent statement was admissible to rehabilitate her testimony after the defendant alleged on cross-examination that she had fabricated her testimony on direct examination); see also King v. State, 61 N.E.3d 1275 (Ind. Ct. App. 2016).

1. Statement must have been made before motive to fabricate arose

If Federal Rule 801(d) (which is same as the Indiana Rule) were interpreted to permit introduction of prior statements to rebut every implicit charge that witness' in-court testimony results from recent fabrication, improper influence or motive, whole emphasis of trial could shift to out-of-court statements rather than in-court evidence. Tome v. U.S., 513 U.S. 150, 115 S. Ct. 696 (1995). Thus, the prior consistent statements must have been made before the motive to fabricate arose, to ensure that they were not contrived as a consequence of that motive. Stephenson v. State, 742 N.E.2d 463, 474 (Ind. 2001); Evans v. State, 643 N.E.2d 877 (Ind. 1994). There is no bright-line rule for determining whether or when a motive to fabricate has arisen. Stephenson v. State, 742 N.E.2d 463, 474 (Ind. 2001). It is a fact-sensitive question. Holsinger v. State, 750 N.E.2d 354 (Ind. 2001).

> Marshall v. State, 643 N.E.2d 957 (Ind. Ct. App. 1994) (prior consistent statement given by victim in sex case to her friend before accusations went public was admissible at trial to rebut the defendant's charge of recent fabrication due to money).
>
> Caley v. State, 650 N.E.2d 54 (Ind. Ct. App. 1995) (where child molest victim's vengeful motive for lying arose before her prior statement, her prior statement was inadmissible as a prior consistent statement).

In cases where the declarant was a defendant or co-defendant, the motive to fabricate likely arises immediately upon commission of the crime. Sturgeon v. State, 719 N.E.2d 1173 (Ind. 1999) (*citing* to Bouye v. State, 699 N.E.2d 620

(Ind. 1998) and Thompson v. State, 690 N.E.2d 224 (Ind. 1997)). However, being a participant in a crime does not automatically create a motive to fabricate, even where the police are inquiring into the declarants involved in the crime. Holsinger v. State, 750 N.E.2d 354 (Ind. 2001). It is a fact-sensitive issue. Id.

Bouye v. State, 699 N.E.2d 620 (Ind. 1998) (trial court erroneously allowed detective to read State witness's statements, as they appeared in probable cause affidavit; the witness' motive to fabricate which was to stay out of jail arose the day the crime occurred).

Evans v. State, 643 N.E.2d 877 (Ind. 1994) (statement to police came before witness reached plea agreement with the State and, thus, was admissible under Rule 801(d)(1)(b); because witness was deposed after making deal with State, thus his deposition was admissible only under doctrine of completeness and not 801). See also Holsinger v. State, 750 N.E.2d 354 (Ind. 2001).

Sturgeon v. State, 719 N.E.2d 1173 (Ind. 1999) (witness admitted helping move victim's body; while acknowledging possibility of motive to fabricate on witness's part since he knew he could be charged with assisting a criminal, court found no evidence which tended to implicate witness in murder and therefore no evidence he had motive to lie about the defendant's involvement when questioned).

Bullock v. State, 903 N.E.2d 156 (Ind. Ct. App. 2009) (where declarant knew he was in just as much trouble as defendant at the time he gave his statement to the police, his motive to fabricate and shift blame had already arisen and his statement was inadmissible as a prior consistent statement; admission of prior consistent statement was erroneous but harmless).

PRACTICE POINTER: When attempting to prohibit the State from using prior statements made by a co-defendant after being arrested but before entering into an agreement with the State, see State v. Spillers, 847 N.E.2d 949 (Ind. 2006), which discusses an accomplice's motivation to curry favor with the police early in the criminal proceedings.

(2) Prior statement must be substantially consistent with testimony

Trial testimony and the prior statement need not be entirely consistent for purposes of admission of the prior statement under Rule 801(d)(1)(B). Brown v. State, 671 N.E.2d 401, 407 (Ind. 1996). The prior statement must be sufficiently consistent with the witness's trial testimony to rebut inference of recent fabrication. Willoughby v. State, 660 N.E.2d 570, 579-80 (Ind. 1996).

Willoughby v. State, 660 N.E.2d 570 (Ind. 1996) (although initial statement to police was not completely consistent with his testimony and lessened declarant's role in the murder, statement was sufficiently consistent in substantial aspects to rebut inference of fabrication in exchange for lenient treatment).

(3) Statement itself must be used

The proponent of a prior consistent statement must offer the statement itself into evidence and not a bare conclusion that the prior statement is consistent. The jury should be able to draw its own conclusions from the prior statements. Owens v. State, 659 N.E.2d 466, 477 (Ind. 1995).

d. Statement used as identification - Rule 801(d)(1)(C)

Rule 801(d)(1)(C) defines identifications made by a declarant subject to cross-examination as non-hearsay because they are believed to be reliable. Robinson v. State, 682 N.E.2d 806, 811 n.5 (Ind. Ct. App. 1997). Neither the prior statement nor the declarant's in-court testimony need be certain or positive; equivocation in the prior identification or inability to identify the person in court affects the statement's weight rather than its admissibility over a hearsay objection. Davis v. State, 13 N.E.3d 939, 945 (Ind. Ct. App. 2014).

U.S. v. Blackman, 66 F.3d 1572 (11th Cir. 1995) (FBI agent permitted to testify that bank teller had identified defendant from photo array as a robber, although teller could not identify defendant at trial), *cert. denied*, 116 S.Ct. 1365 (1996).

U.S. v. O'Malley, 796 F.2d 891, 899 (7th Cir.1986) (nothing in the rule prohibits the introduction of out-of-court statements identifying the defendant made by the declarant who at trial admitted that he made the prior identification but now denies that the defendant was the same person involved in the crime).

Beasley v. State, 30 N.E.3d 56 (Ind. Ct. App. 2015), *sum. aff'd.*, 46 N.E.3d 1232 (Ind. 2016) (State witness's prior statements to police at scene of shooting identifying defendant as one of two individuals who shot him was admissible under Rule 801(d)(1)(C)).

(1) Identification must have been made shortly after perception

An identification made shortly after the occurrence of the event is an identification made when memory is the freshest. The term "shortly" is relative rather than precise. Robinson v. State, 682 N.E.2d 806, 811 (Ind. Ct. App.1997).

Robinson v. State, 682 N.E.2d 806 (Ind. Ct. App.1997) (identification made two months and thirteen days after crime was 'shortly after' perceiving defendant where the declarant was familiar with the defendant before the shooting).

(2) Rationale

One of the reasons for the creation of Rule 801(d)(1)(C) was to remedy the situation where a witness identifies the defendant before trial and then at trial, because of fear or other reasons, recants the previous identification. Robinson v. State, 682 N.E.2d 806, 811 (Ind. Ct. App. 1997).

2. Statements by opposing party - Rule 801(d)(2)

A statement is not hearsay if the statement is offered against an opposing party and (A) was made by the party in an individual or representative capacity (B) is one the party manifested that it adopted or believed to be true (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy. Indiana Rule of Evidence 801(d)(2).

a. Rationale

The admissibility of a statement made by the party-opponent is based on the adversary theory of litigation and not on the idea that the circumstances in which it was made enhances its reliability. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of belief except when speaking under oath. See Sharp v. State, 534 N.E.2d 708, 711 (Ind. 1989).

b. Who is a party? Rule 801(d)(2)(A)

(1) Government employees, including police officers, in criminal cases

The party-opponent provision of Rule 801(d)(2) applies in criminal cases to statements by government employees, including police officers, concerning matters within the scope of their employment. Allen v. State, 787 N.E.2d 473, 479 (Ind. Ct. App. 2003).

Banks v. State, 839 N.E.2d 794 (Ind. Ct. App. 2005) (the trial court erred in excluding the defendant's testimony concerning what a police officer told him during an undercover operation on grounds that it constituted hearsay).

Turner v. State, 933 N.E.2d 640 (Ind. Ct. App. 2013) (because confidential informant was acting as State agent, his statement was not hearsay but statement of a party opponent).

(2) Victim not party to prosecution

The victim in a criminal case is not a party to the prosecution. Consequently, the victim's hearsay statements cannot be admitted into evidence as statements by a party-opponent. Shields v. State, 149 Ind. 395, 49 N.E. 351, 354 (1898); Miller, *Courtroom Handbook on Indiana Evidence* p. 283 (Thomson Reuters 2016-2017 ed.).

(3) The defendant is a party

(a) Conversations with others

Williams v. State, 669 N.E.2d 956 (Ind. 1996) (dead informant's contributions to a taped conversation were not admitted for the truth of the matters asserted and

were largely designed to prompt defendant to speak; it was the taped statements made by defendant that really constituted the evidentiary weight of the conversation; therefore, the informant's statements were not hearsay).

Lancaster v. State, 153 N.E.3d 1144 (Ind. Ct. App. 2020) (no error in permitting witness to testify about the conversation he overheard between defendant and defendant's brother about the need to kill all three victims before the murders occurred; defendant's reply to his brother's statement that they needed to kill one of defendant's drug buyers, that if they killed buyer they would need to kill her boyfriend and his family, was not inadmissible hearsay, in prosecution for murder, where defendant was a party opponent, and reply was offered by the State against defendant).

(b) Threats

Neal v. State, 659 N.E.2d 122, n.1 (Ind. 1995) (threat made against witness was not only admissible as threat to show the defendant's guilty knowledge but was also admissible as statement by party-opponent), *overruled on other grounds by* Richardson v. State, 717 N.E.2d 32 (Ind. 1999).

c. Statements adopted by a party - Rule 801(d)(2)(B)

Admissions by an opposing party, including adoptive admissions, fall outside the hearsay rule. An adoptive admission is a statement that the defendant has adopted as his own. Thus, the defendant himself is, in effect, the declarant. The rule requires only a manifestation of a party's intent to adopt another's statements, or evidence of the party's belief in the truth of the statements. Lack of an opportunity to cross-examine the declarant of a statement the defendant has adopted as his own does not violate the confrontation clause. U.S. v. Allen, 10 F.3d 405, 413 (7th Cir. 1993). A party can adopt another's statement through conduct or otherwise. Ross v. Olson, 825 N.E.2d 890 (Ind. Ct. App. 2005).

Tacit admissions can be as powerful as confessions.

Moredock v. State, 441 N.E.2d 1372 (Ind. 1982) (affidavit by alleged victim's cousin that victim had tacitly admitted defendant had not raped her and felt remorse after conclusion of trial consisted newly discovered evidence sufficient to require reversal).

(1) Adoption by implication

U.S. v. Allen, 10 F.3d 405, 413 (7th Cir. 1993) (from the entire context of each conversation, including the non-verbal cues the jury could see in the tapes, along with defendant's failure to contest any incriminating statements, the district court and the jury could find that defendant adopted declarant's statements).

U.S. v. Champion, 813 F.2d 1154 (11th Cir.1987) (one defendant adopted another's statement when he nudged his codefendant in ribs after statement was made and said that he did not want him to speak about incident any more).Shackelford v. State, 498

N.E.2d 382 (Ind. 1986) (where defendant went beyond remaining silent and joined in conversation agreeing with what co-defendant said and adding his own commentary, the statements by co-defendant were admissible as statements of party-opponent; introduction of statement without opportunity to cross did not violate Bruton).

Wickliffe v. State, 424 N.E.2d 1007 (Ind.1981) (where the defendant clapped his hands, smiled, and nodded his head in response to declarant's statement that he loved the way the defendant beat and stabbed the victim was a tacit admission and admissible).

(2) Adoption by silence

(a) Admitted with caution

Courts have concluded that evidence of tacit admissions is suspect and should be introduced with caution. An equivocal or evasive response to accusations which would naturally be denied may be admitted into evidence as an admission. Miller v. State, 500 N.E.2d 193 (Ind. 1986).

Scisney v. State, 690 N.E.2d 342 (Ind. Ct. App. 1997) (failure to act surprised when large quantity of cocaine was found in the defendant's car did not constitute a tacit admission), *sum. aff'd*, 701 N.E.2d 847 (Ind. 1998).

James v. State, 481 N.E.2d 417 (Ind. Ct. App. 1985) (failure to deny fondling when not explicitly asked is insufficient evidence to support conviction for child molesting; case includes good discussion of tacit admissions).

House v. State, 535 N.E.2d 103 (Ind. 1989) (where the defendant did not deny being the murderer, the conversation was admissible; any questions concerning the reliability of the circumstances surrounding the admission and described by the witness were for the jury).

Miller v. State, 500 N.E.2d 193 (Ind. 1986) (because one who is addressed by the wrong name is reasonably expected to inform the speaker of the error, failure to correct declarant when referred to by a name was admissible to prove the robber's name).

The party must have been given the opportunity to speak and deny statement. Springer v. Byram, 137 Ind. 15, 36 N.E. 361 (1894); see also Imwinkelried, *Evidentiary Foundations,* 440-431 (9th ed. 2015).

(b) Exception

A defendant has the right to remain silent, and use of a defendant's post-arrest silence for impeachment purposes violates due process. Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240 (1976).

(3) Adoption of documents and records

A party can adopt out-of-court documents and records. See U.S. v. Gil, 58 F.3d 1414 (9th Cir. 1995), *cert. denied*.

U.S. v. Gil, 58 F.3d 1414 (9th Cir. 1995) (drug ledger properly admitted in drug prosecution after prosecution established an adequate foundation to support finding that defendant either made or adopted ledger; ledger found on defendant's coffee table and transactions described in ledger corresponded with defendant's activities that were observed by police; entries corresponded with separate ledger that was prepared by defendant), *cert. denied*.

Thomas v. State, 612 N.E.2d 604 (Ind. Ct. App. 2003) (agreed Entry from CHINS action stating girls were victims of sex offense and that the defendant agreed to participate in incest program was statement of party-opponent in child molest case; case distinguished from other cases in which signing of agreed entry was compelled in order for defendant to keep children).

But see Collins v. State, 826 N.E.2d 671 (Ind. Ct. App. 2005) (admission of eyewitness' tape-recorded statement describing the shooting was inadmissible as statement of party-opponent; fact that after police played statement to defendant, he admitted to the shooting did not mean defendant adopted the statement; rather, defendant disputed that the shooting happened as witness described; reversible error).

d. Authorized statements - Rule 801(d)(2)(C)

Under Rule 801(d)(2)(C), an out-of-court statement made by a person whom the party authorized to make a statement on the subject will be attributed to that party. The statement is imputed to the party for purposes of the hearsay rule.

(1) Interpreters

As a general rule, an interpreter's translation does not create an additional level of hearsay. U.S. v. Cordero, 18 F.3d 1248 (5th Cir. 1994) (*per curiam*).

U.S. v. Beltran, 761 F.2d 1 (1st Cir. 1985) (drug agent's testimony as to what an interpreter told him that various defendants said was admissible).

(2) Statements of Counsel

Unambiguous and unequivocal statements of fact by a party's attorney can qualify for admissibility when offered against the client under Rule 801(d)(2)(C) or (D). Krampen v. Krampen, 997 N.E.2d 73, 81-82 (Ind. Ct. App. 2013).

U.S. v. Blood, 806 F.2d 1218 (4th Cir. 1986) (a clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon a party).

U.S. v. Bentson, 947 F.2d 1353 (9th Cir. 1991) (statement by defense counsel in closing argument that defendant had not filed valid tax returns was a judicial admission binding before both the trial and appellate courts), *cert. denied* 112 S. Ct. 2310 (1992).

PRACTICE POINTER: There may be instances where it is unfair to hold the defense attorney's statement against the defendant. The defense attorney, not the defendant, has control over what arguments are to be made in front of the jury. Ind. Rule of Professional Conduct 1.2. On the other hand, if the State argues an inconsistent theory in a pre-trial hearing, such as a suppression hearing, or in a co-defendant's trial, not only could Rule 801(d)(2)(C) or (D) be used to admit the prior inconsistent statements by the State, but also the doctrine of collateral estoppel may be used to prohibit the inconsistent arguments. See Jennings v. State, 714 N.E.2d 730 (Ind. Ct. App. 1999) (collateral estoppel applied to suppression hearings).

e. Agency relationship- Rule 801(d)(2)(D)

(1) Establishing foundation

Proponent of the evidence must establish foundation:

(1) showing the existence of the agency relationship;
(2) that the statement was made during the existence of the declarant's agency or employment; and
(3) that the statement concerns a matter within the scope of the agency or employment.

See Pappas v. Middle Earth Condo. Ass'n, 963 F.2d 534 (2d Cir. 1992) (agency can be proved by circumstantial evidence).

(2) Government Informants

Turner v. State, 993 N.E.2d 640, 643 (Ind. Ct. App. 2013) (confidential informant acted on behalf of State and within scope of his agency; thus, his statements could properly be considered non-hearsay statements pursuant to Rule 801).

U.S. v. Branham, 97 F.3d 835 (6th Cir. 1996) (defendant in marijuana conspiracy trial sought to support entrapment defense by introducing government informant's statements attempting to involve defendant in number of illegal activities; harmless error for trial court to exclude statements as hearsay because statements were made by agent of party-opponent within scope of his agency and were offered for their effect on defendant's state of mind, not as proof of matters asserted therein).

U.S. v. Summers, 598 F.2d 450 (5th Cir. 1979) (phone conversations recorded on tape were properly admitted because person whose statements implicated defendant was agent making statements within scope of employment).

(3) Statements by Counsel

U.S. v. Valencia, 826 F.2d 169 (2d Cir.1987) (statements made by defense lawyer during informal conversations with prosecutor may not be admitted as agent's admissions to prove defendant's consciousness of guilt).

U.S. v. Harris, 914 F.2d 927 (7th Cir.1990) (no error in admitting statements as vicarious admissions by defendant's former counsel, who had been investigating mistaken identity theory).

U.S. v. Brandon, 50 F.3d 464 (7th Cir.1995) (response made to grand jury subpoena by defendant's prior attorney was properly admitted; because attorney did not represent defendant in criminal matter, and there was no suggestion he would have done so, none of the policies weighing against admissibility of statements made by an attorney acting as agent for his client were infringed).

PRACTICE POINTER: There may be instances where it is unfair to hold the defense attorney's statement against the defendant. The defense attorney, not the defendant, has control over what arguments are to be made in front of the jury. Ind. Rule of Professional Conduct 1.2. On the other hand, if the State argues an inconsistent theory in a pre-trial hearing, such as a suppression hearing, or in a co-defendant's trial, not only could Rule 801(d)(2)(C) or (D) be used to admit the prior inconsistent statements by the State, but also the doctrine of collateral estoppel may be used to prohibit the inconsistent arguments. See Jennings v. State, 714 N.E.2d 730 (Ind. Ct. App. 1999) (collateral estoppel applied to suppression hearings).

(4) Mates and friends

Cooley v. State, 682 N.E.2d 1277 (Ind. 1997) (prior unsworn statement made by girlfriend concerning what the defendant told her were not statements of a party-opponent).

Hicks v. State, 690 N.E.2d 215 (Ind. 1997) (witness's testimony about what the defendant's friend, in the presence of the defendant, said regarding the defendant's statements was not hearsay because it was statement by party opponent, made in representative capacity; the defendant made the friend his representative by telling the friend to go ahead and tell the witness what the defendant had said).

Dorsey v. State, 802 N.E.2d 991 (Ind. Ct. App. 2004) (unidentified male was acting on behalf of the defendant during jailhouse telephone conversation between the witness and himself in which he told the witness he was relaying a message from the defendant; the defendant's presence at or near the placement of the call, along with his participation in call, proves that the unknown male placed the call with the defendant's knowledge and consent, and pursuant to his request; thus, statements of unidentified male were not hearsay).

f. Statements of co-conspirators - Rule 801(d)(2)(E)

Evidence of acts or statements of a co-conspirator in furtherance of the objects of a conspiracy is admissible against all the parties to the conspiracy even though the

statements were made, or the acts were performed in the absence of the defendant. Wine v. State, 539 N.E.2d 932 (Ind.1989).

In order for a co-conspirator statement to be admissible, the State must prove that a conspiracy existed, both the declarant and the party against whom the statement is offered were part of the conspiracy, and the statements were made during the course of and in furtherance of the conspiracy. Barber v. State, 715 N.E.2d 848, 852 (Ind. 1999).

Often, the inability of the State to make the proper foundation for the hearsay may also result in the acquittal of the defendant on the conspiracy. See, e.g., Cockrell v. State, 743 N.E.2d 799 (Ind. Ct. App. 2001). However, a formal charge of conspiracy is not required to invoke the evidentiary rule. Murrell v. State, 747 N.E.2d 567, 571 (Ind. Ct. App. 2001). Further, a ruling admitting coconspirator statements is not invalidated by a subsequent acquittal of the co-conspirator-declarant. U.S. v. Carroll, 860 F.2d 500 (1st Cir.1988).

(1) Must prove conspiracy existed

The common law "independent evidence" requirement survived the adoption of the evidence rules. Lott v. State, 690 N.E.2d 204 (Ind. 1997). The proponent of the co-conspirator statement must prove by a preponderance of the evidence, that there is independent evidence of a conspiracy, i.e., evidence other than the statement itself. Cockrell v. State, 743 N.E.2d 799, 806 (Ind. Ct. App. 2001). Such proof may be either direct or circumstantial. Relationship and association with the co-conspirator, standing alone, is insufficient to establish the conspiracy. Id. The trial court is vested with discretion in determining whether such evidence is sufficient to establish a conspiracy.

Cockrell v. State, 743 N.E.2d 799 (Ind. Ct. App. 2001) (the co-conspirator was never seen with the defendant and there was no evidence that the two ever had any contact with each other; the only evidence was that a third party would go to the defendant's apartment when the co-conspirator asked for drugs; without evidence that the defendant agreed with the alleged co-conspirator, no conspiracy was established).

Barber v. State, 715 N.E.2d 848 (Ind. 1999) (trial court did not make a determination as to existence of a conspiracy and the State did not point to anything beyond hearsay statement itself in support of the existence of a conspiracy; harmless error).

Houser v. State, 661 N.E.2d 1213 (Ind. Ct. App. 1996) (a co-conspirator's statements before and during the conspiracy were admissible under IRE 801(d)(2)(e), where there was circumstantial evidence of the conspiracy independent of statements, i.e., phone calls and meetings between the two). See also Cain v. State, 594 N.E.2d 835 (Ind. Ct. App. 1992).

Wright v. State, 690 N.E.2d 1098 (Ind. 1997) (sufficient evidence of a conspiracy existed to permit admission of a declarant's statements against the defendant, where: 1) defendant told the police he knew another co-conspirator had a gun and

wanted to do "devious" things, 2) that he drove two co-conspirators and was present when they showed the victim the gun and demanded money, 3) that he waited while co-conspirators shot victim, and 4) declarant testified regarding activities of group prior to shooting, including that the defendant was standing next to co-conspirators at the time one stated that he wanted to rob and kill someone); see also M.T.V. v. State, 66 N.E.3d 960 (Ind. Ct. App. 2016).

PRACTICE POINTER: In Bourjaily v. U.S., 483 U.S. 171 (1987), the U.S. Supreme Court held that the content of out-of-court statements could be considered in determining whether the government had established, by a preponderance of the evidence, the existence of a conspiracy, that the defendant had joined the conspiracy, and that the statement was made during and in furtherance of the conspiracy. After Bourjaily, Federal Evidence Rule 801(d)(2) was amended to provide that the contents of the statement may be considered but are not alone sufficient to establish the existence of the conspiracy and the participation of the declarant and the party against whom the statement is offered. U.S. v. Kemp, 2005 U.S. Dist. LEXIS 2072.

(2) Declarant and party must have been members of conspiracy

The proponent of the statement must prove, by a preponderance of the evidence, that the declarant and the party were participants in the conspiracy. Wright v. State, 690 N.E.2d 1098, 1105 (Ind. 1997). Co-conspirator statements must have been made by, but need not have been made to, a conspirator. See, e.g., Murrell v. State, 747 N.E.2d 567, 571 (Ind. Ct. App. 2001).

Statements made before a defendant joined the conspiracy may be admissible. See Patton v. State, 241 Ind. 645, 175 N.E.2d 11, 12 (Ind. 1961).

U.S. v. Sophie, 900 F.2d 1064 (7th Cir. 1990), *cert. den.* 111 S. Ct. 124 (statement about defendant, made in furtherance of conspiracy before he joined it, was admissible against him).

U.S. v. Liefer, 778 F.2d 1236 (7th Cir. 1985) (defendant and the declarant need not both be members of the conspiracy at the time of the statement; a defendant who joins a conspiracy after its inception adopts all prior acts and declarations in furtherance of the conspiracy by his fellow co-conspirators).

(3) Statements must have furthered conspiracy

The statements must in some way have been designed to promote or facilitate achievement of the goals of the ongoing conspiracy. Wright v. State, 690 N.E.2d 1098, 1105 (Ind. 1997). For example, the statements may have promoted the goals of the conspiracy by reassuring a co-conspirator, seeking to induce a co-conspirator's assistance, serving to foster trust and cohesiveness, or informing co-conspirators of the progress or status of the conspiracy, or by prompting the listener, who need not be a co-conspirator, to respond in a way that promotes or facilitates the carrying out of a criminal activity. Leslie v. State, 670 N.E.2d 898, 900-01 (Ind. Ct. App. 1996).

Mere "idle chatter" does not satisfy the in-furtherance requirement of Rule 801(d)(2)(E). Leslie v. State, 670 N.E.2d 898, 900-01 (Ind. Ct. App. 1996); U.S. v. Tracy, 12 F.3d 1186, 1196 (2d Cir. 1993).

> Leslie v. State, 670 N.E.2d 898 (Ind. Ct. App. 1996) (statement that "Bobbie was close to being busted or raided ... They just walked away from a large amount on a ship" was mere idle chatter; however, two other statements were found to be in furtherance of the conspiracy).
>
> U.S. v. Mitchell, 31 F.3d 628 (8th Cir. 1994) (error, but harmless in this case, to admit co-conspirator's statements that simply informed listener of declarant's criminal activities and did not further objectives of conspiracy).
>
> Murrell v. State, 747 N.E.2d 567 (Ind. Ct. App. 2001) (statement of one co-conspirator identifying the other to an officer, in his undercover capacity, was in furtherance of the conspiracy).

Ordinarily, the commission of the planned criminal act will terminate the conspiracy. However, the conspiracy and its objectives will sometimes exceed the mere successful commission of the underlying criminal offense. Wallace v. State, 426 N.E.2d 34 (Ind. 1981).

> Willoughby v. State, 660 N.E.2d 570 (Ind. 1996) (co-conspirator's statements relating to payment of insurance proceeds for his part in murder for hire scheme were admissible because statements were in furtherance of objective of conspiracy, although made after the murder). See also Wallace v. State, 426 N.E.2d 34 (Ind. 1981).
>
> United States v. Mealy, 851 F.2d 890, 899 (7th Cir. 1988) (a co-conspirator's arrest does not automatically terminate a conspiracy; the remaining conspirators may continue to carry out the goals of the conspiracy notwithstanding the arrest of one of their partners).

A co-conspirator's confession or admission of the existence of a conspiracy made after he has been apprehended or arrested are ordinarily not within the scope of or in furtherance of the conspiracy so as to be admissible against his fellow conspirators. Simpson v. State, 628 N.E.2d 1215 (Ind. Ct. App. 1994). In all such post-crime periods, the dominant motive of the individual offender is self-interest in avoiding detection and in enjoying the fruits of the crime. Mayhew v. State, 537 N.E.2d 1188 (Ind. 1989). Pre-crime group interests have steeply declined. The exception has artificial basis and should be limited to situations in which efforts of all are clearly being applied toward single target. Id.

> Mayhew v. State, 537 N.E.2d 1188 (Ind. 1989) (statements made by co-conspirator to the witness in a car ride to the police station instructing the witness to falsify statement were not made in furtherance of the conspiracy; the robbery was completed; however, because the statements were commands and not assertions, they were not subject to hearsay rule).

The admission of an accomplice's statement made to the police implicating both the co-conspirator and the defendant may violate the Confrontation Clause of the Sixth Amendment. Lilly v. Virginia, 119 S. Ct. 1887, 527 U.S. 116 (1999); Crawford v. Washington, 124 S. Ct. 1354, 541 U.S. 16 (2004).

(4) Constitutional implications

Confrontation Clause is satisfied when statement is properly admitted under coconspirator rule, which is so firmly rooted that no independent inquiry into the reliability of particular statements that satisfy the rule is necessary. Bourjaily v. U.S., 483 U.S. 171, 107 S. Ct. 2775 (1987).

Jones v. State, 834 N.E.2d 167 (Ind. Ct. App. 2005) (statement made during commission of crime was not testimonial, and therefore, not subjected to the requirements set forth in Crawford v. Washington, 124 S. Ct. 1354 (2004); in other words, the defendant did not have to have the opportunity to cross-examine the co-conspirator who made the statement).

Cardosi v. State, 128 N.E.3d 1277 (Ind. 2019) (defendant's right to confrontation was not violated by the admission of his co-conspirator's post-crime text messages because the messages were not testimonial).

II. THE RULE AGAINST HEARSAY - RULE 802

A. OFFICIAL TEXT:

Hearsay is not admissible unless these rules or other law provides otherwise.

B. THE PURPOSE OF EXCLUDING HEARSAY

1. Lack of cross-examination and confrontation

When offered for its truth, the evidentiary value of a statement depends upon the credibility of the declarant, but if the declarant does not testify in court, the declarant's credibility cannot be assessed by the trier of fact. The principal reasons to exclude hearsay evidence are that the out-of-court declarant is not under oath, is not subject to confrontation by the trier of fact and is not subject to cross-examination by the accused. Mason v. State, 689 N.E.2d 1233, 1236 (Ind. 1997).

The value of testimony depends upon the perception, memory, narration, and sincerity of the witness. Witnesses are ordinarily required to testify under oath, to be personally present at trial, and to be subject to cross-examination. In the hearsay situation, two 'witnesses' are involved, only one of whom complies with the three requirements listed above, and who merely reports what the declarant said. 2 *McCormick on Evidence* 179 § 245 (7th ed.). Historically, hearsay was excluded because the declarant usually was not speaking under oath, because the declarant was typically not present at trial, and because the adverse party would not have the opportunity to cross-examine the declarant. 2 *McCormick on Evidence* 179-81 § 245 (7th ed.); see Wells v. State, 254 Ind. 608, 261 N.E.2d 865, 869 (Ind. 1970); Miller, 13 *Indiana Evidence* 310 § 802.102 (4th ed.).

2. Lessened probative value

"Hearsay evidence, standing alone, and not clothed with indicia of reliability associated with the exceptions which may render it admissible, is not sufficient evidence of probative value to sustain a conviction." Jackson v. State, 485 N.E.2d 144, 147 (Ind. Ct. App. 1985). "Hearsay evidence is not sufficient evidence of probative value to sustain a conviction when it is the only evidence on an essential element of the offense. Of necessity, the fact finder is giving credit to the hearsay evidence based upon the credibility of the non-declarant witness through whom the out-of-court statement is admitted rather than the credibility of the declarant. That circumstance, which necessarily means the evidence was never subjected to the safeguard of cross-examination, deprives it of probative value." Id. at 149.

C. CONSTITUTIONAL LIMITATIONS

"While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have

never established such a congruence; indeed, we have more than once found a violation of the confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception." California v. Green, 90 S. Ct. 1930, 1934, 399 U.S. 149, 26 L.Ed.2d 489 (1970).

1. State's evidence - Evidence Rules trumped by the right to confront and cross-examine

The hearsay rule is closely related to the right to confront and cross-examine witnesses under the 6th Amendment to the U.S. Constitution, and Article 1, Section 13 of the Indiana Constitution, but they are not coextensive. See Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004); Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999) (concurring opinions of Breyer, Scalia, Thomas, and Rehnquist); California v. Green, 399 U.S. 149, 155, 90 S.Ct. 1930, 1934 (1970); Miller, 13 *Indiana Evidence* 312 § 802.103 (4th ed.).

Evidence which would be admissible under the hearsay rules in a civil case, or against the State in a criminal case, may be inadmissible against a defendant because its admission would violate the defendant's rights under the Confrontation Clause. See Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999); Crawford v. Washington, *supra*. "One of the bedrock constitutional protections afforded to criminal defendants is the Confrontation Clause of the Sixth Amendment..." Hemphill v. New York, 595 U.S. ——, 142 S. Ct. 681, 690 (2022).

Cross examination has long been considered the "greatest legal engine ever invented for the discovery of truth." Lilly, 119 S. Ct. at 1894 (*quoting* California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930 (1970)). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." Id. at 1894 (*quoting* Maryland v. Craig, 497 U.S. 836, 845 110 S. Ct. 3157 (1990)).

PRACTICE POINTER: The U.S. Supreme Court significantly expanded defendants' federal constitutional right to cross-examine hearsay declarants in Crawford v. Washington, 124 S. Ct. 1354 (2004). Crawford overturned Ohio v. Roberts, 100 S. Ct. 2531, 448 U.S. 56 (1980), which held that the function of cross-examination was to ensure that testimony was 'reliable' and that other 'indicia of reliability,' if present, could substitute for cross-examination without violating the federal confrontation clause. The Court in Crawford rejected the Ohio v. Roberts test and held that there is no substitute for the constitutional guarantee of cross-examination when "testimonial hearsay" is involved. However, because the now-rejected Ohio v. Roberts rule has become so deeply embedded in hearsay and confrontation jurisprudence, it will likely take years to eradicate. Be alert for references to 'indicia of reliability' in any opinion dealing with hearsay; many such references are the progeny of Ohio v. Roberts. "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." Crawford, 124 S. Ct. at 1371. However, there are a few cases, such as Lilly v. Virginia, 119 S. Ct. 1887 (1999), which prohibited the admission of hearsay statements of accomplices who took some blame but not all against the defendant. Although the reasoning in Lilly, *supra*, may have been criticized in Crawford, *supra,* there is still good language within the opinion about the unreliability of accomplice testimony. Further, the Ohio v. Roberts test may still be a proper test for non-testimonial hearsay.

a. Sixth Amendment right to cross-examine and confront

The purposes of confrontation are: "(1) insures that the witness will give his statement under oath - thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth'; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility." California v. Green, 90 S. Ct. 1930, 1935, 399 U.S. 149 (1970). In holding the right of confrontation applicable to the States through the Fourteenth Amendment, the Supreme Court has held that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Barber v. Page, 390 U.S. 719, 721, 88 S. Ct. 1318 (1968).

(1) Testimonial hearsay of unavailable declarant

For testimonial hearsay from an absent declarant to be admissible against a criminal defendant, the declarant must be unavailable, and the defendant must have had a prior opportunity to cross-examine the declarant about the statement. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1374 (2004).

(a) Testimonial

Testimonial hearsay is hearsay that is likely to be used in trial. "Testimonial hearsay" includes, at least, prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and statements made under police interrogation. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1374 (2004); Davis v. Washington, 126 S. Ct. 2266 (2006). Generally, testimonial hearsay are statements made to an agent of the State relaying information after an emergency situation has passed.

(i) Statements to police/ 911 calls

Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. Davis v. Washington, 126 S. Ct. 2266 (2006).

Michigan v. Bryant, 131 S. Ct. 1143 (2010) (police asked a shooting victim what happened and who had shot him; victim gave the police the name of the shooter, then died a few hours later. The prosecution laid a foundation at trial for the statements' admission as "excited utterances." The victim's statement was not barred by the Confrontation Clause because it was not testimonial; the circumstances 'objectively indicate'

that the police questioning was primarily to meet an ongoing emergency).

Hammon v. Indiana, 126 S. Ct. 2266 (2006) (reversing Hammon v. State, 829 N.E.2d 444 (Ind. 2005), and holding that where declarant was separated from the defendant, statement recounted how potentially criminal past events began and progressed and the interrogation took place sometime after the events were over, declarant's statements to officers at the scene were testimonial).

Gayden v. State, 863 N.E.2d 1193 (Ind. Ct. App. 2007) (where portions of 911 call were non-testimonial because an emergency was ongoing, but later portions were arguably testimonial, objection to the whole tape being introduced into evidence did not preserve the Sixth Amendment issue to only a portion of the tape).

Boatner v. State, 934 N.E.2d 184 (Ind. Ct. App. 2010) (CW's statement that defendant pushed and hit her was not testimonial as there was no indication officer's primary purpose in speaking to CW was to establish or prove past events potentially relevant to later prosecution; CW was disoriented, crying, without shoes, and almost ran to the officer in her attempt to find help), *accord*, Sandefur v. State, 945 N.E.2d 785 (Ind. Ct. App. 2011); and Wallace v. State, 79 N.E.3d 992 (Ind. Ct. App. 2017).

McQuay v. State, 10 N.E.3d 593 (Ind. Ct. App. 2014) (victim's statements identifying defendant as perpetrator were not testimonial as they addressed ongoing emergency created by fact that defendant was still at large and still posed a threat to victim and others).

State v. Kirby, 908 A.2d 506 (Conn. 2006) (following Davis v. Washington, 126 S. Ct. 2266 (U.S. 2006), and holding that abduction victim's statements in a telephone call to a police dispatcher immediately following her escape from her abductor qualified as "testimonial").

PRACTICE POINTER: Cases such as Gamble v. State, 831 N.E.2d 178 (Ind. Ct. App. 2005), Rogers v. State, 814 N.E.2d 695 (Ind. Ct. App. 2004), and Frye v. State, 850 N.E.2d 951 (Ind. Ct. App. 2006), that found 911 calls and statements made to police immediately after the instant offenses were non-testimonial, are of questionable validity since the Supreme Court reversed the Indiana Supreme Court in Davis v. Washington and Hammon v. Indiana, 126 S. Ct. 2266 (U.S. 2006).

(ii) Statements to those other than police

Although statements to people other than law enforcement officials are not categorically admissible, such statements are much less likely to be testimonial. Ohio v. Clark, 135 S. Ct. 2173 (2015).

Ward v. State, 50 N.E.3d 752 (Ind. 2016) (statements to treating paramedic and forensic nurse identifying defendant as attacker was not

testimonial hearsay because primary purpose of declarant's statements was to obtain appropriate medical and psychological treatment).

Wallace v. State, 836 N.E.2d 985 (Ind. Ct. App. 2005) (testimony of witnesses pertaining to victim's answers identifying the defendant as the shooter, were not "testimonial" statements; no evidence to suggest that EMT and emergency room nurse's inquiries of victim were taken with an eye toward trial).

Jones v. State, 834 N.E.2d 167 (Ind. Ct. App. 2005) (co-conspirator's statement made during commission of crime was not testimonial, and therefore, not subjected to the requirements set forth in Crawford v. Washington, 124 S. Ct. 1354 (2004)).

Perry v. State, 956 N.E.2d 41 (Ind. Ct. App. 2011) (rape victim's account of the crime to a "sexual assault nurse examiner" was relevant to the hospital's treatment of her and was therefore non-testimonial; however, conviction was reversed and remanded for a new trial on other grounds).

Palilonis v. State, 970 N.E.2d 713 (Ind. Ct. App. 2012), *transfer denied* ("primary purpose" of examination by nurse was "to furnish and receive emergency medical and psychological care" after victim had been raped; therefore, the victim's statements to the nurse were non-testimonial).

(iii) Statements of children

Ohio v. Clark, 135 S. Ct. 2173 (2015) (three-year-old child's out-of-court statement to a teacher about who caused his injuries was non-testimonial because it was made to someone other than a law enforcement officer).

Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005) (in child molesting prosecution, complaining witness's statements to her great-grandmother were admissible under Indiana's Protected Person statute and Crawford v. Washington, 541 U.S. 36 (2004), but statements she made to detective and caseworker were "testimonial" and not admissible).

Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005) (simply because parents suspected illegal activity on defendants' part when they spoke to their child and contacted police after getting information did not make the child's statement testimonial; however, statements made by the child to a police officer after his parents contacted police were testimonial, as the primary purpose of the questioning was to get information for prosecution).

(iv) Certificates, autopsies, reports, etc. prepared for use at trial or to assist in law enforcement investigation

Forensic lab reports are "testimonial" when circumstances objectively indicate that they are being made for the primary purpose of preserving evidence for criminal litigation. Bullcoming v. New Mexico, 131 S. Ct.

2705, 2716-17 (2011). A defendant can waive her Confrontation rights if the State gives statutory notice of its intent to use a lab report or certificate of analysis and the defendant does not file a timely demand for cross-examination of the preparer. See IC 35-36-11 (requiring defendant to file demand within 10 days of receiving prosecutor's notice).

Richardson v. State, 856 N.E.2d 1222 (Ind. Ct. App. 2006) (relying on a statement in Crawford, *supra*, that "[m]ost hearsay exceptions covered statements that by their nature were not testimonial-- for example, business records or statements in furtherance of a conspiracy", court found medical records were non-testimonial).

PRACTICE POINTER: Despite Justice Scalia's statement that most hearsay exceptions, such as business records, involve non-testimonial statements, each hearsay statement must be analyzed on a case-by-case basis. For instance, if a declarant who is preparing the business record is doing so in anticipation for litigation, then the business record should be considered testimonial. The courts have long recognized that some business records are inadmissible when made in anticipation of litigation. See Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, 87 L. Ed. 645 (1943) (railroad took statement from the locomotive engineer after a crossing accident; when the engineer died before trial, the railroad offered the statement under the common law 'regular course of business' exception; the report was not within the exception; although the railroad routinely collected accident reports, they were "calculated for use essentially in the court, not in the business."); 2 *McCormick on Evidence* §288, 439-41 (7th ed.).

Napier v. State, 820 N.E.2d 144 (Ind. Ct. App. 2005) (State's failure to present live testimony at trial from officer who conducted breath tests violated Confrontation Clause in light of Crawford; however, admission of breath test instrument certification documents did not violate Crawford), *aff'd on reh'g*, 827 N.E.2d 565. See also Rembusch v. State, 836 N.E.2d 979 (Ind. Ct. App. 2005); and Jarrell v. State, 852 N.E.2d 1022 (Ind. Ct. App. 2006).

But see Cranston v. State, 936 N.E.2d 342 (Ind. Ct. App. 2010) (disagreeing with Napier to the extent Napier can be read to hold the breath test printout to be hearsay; however, agreeing with Napier that the breath test operator must testify in order for the printout to be admissible, but the equipment inspector does not).

Jones v. State, 982 N.E.2d 417 (Ind. Ct. App. 2013) (defendant's confrontation rights were not violated by admission of certificate of inspection about accuracy of chemical breath test device, even though person who certified the device did not testify at trial, because certificate was non-testimonial).

Ackerman v. State, 51 N.E.3d 171 (Ind. 2016) (objective circumstances surrounding autopsy report in this case demonstrated that it was not prepared for primary purpose of aiding police investigation, and thus was non-testimonial).

Montgomery v. State, 22 N.E.3d 768 (Ind. Ct. App. 2014), *trans. vacated* (admission of records from National Precursor Log Exchange showing that defendant had bought pseudoephedrine every ten days for several months did not violate Confrontation Clause, because main purpose of records was to track and regulate the sale of non-prescription ephedrine and pseudoephedrine, not to establish or prove some fact at trial).

State v. Renshaw, 915 A.2d 1081 (N.J. Super. 2007) (certification by nurse attesting to fact that she followed medically accepted procedures when taking a blood sample from suspected drunken driver is testimonial). See also State v. Kent, 918 A.2d 262 (N.J. Super. 2007).

Shennett v. State, 937 So.2d 287 (Fla. Ct. App. 2006) (audiotape recording of a police officer's play-by-play description of events that took place in a parking lot that he had under surveillance was testimonial hearsay that was not admissible at trial under the confrontation clause; officer was aware that he was in the midst of surveillance investigation and the recorded observations would have their place in a criminal prosecution).

(v) Legend used to guide interpretation of cell phone bill

Everroad v. State, 998 N.E.2d 739 (Ind. Ct. App. 2013) ("Legend for AT&T Mobility Records," a glossary of terms which witness used to interpret shorthand abbreviations in cell phone records, was not testimonial in nature).

(b) Unavailable

(i) Adult witnesses

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009). The Sixth Amendment requires that a lab chemist be called to testify in order to admit the lab analysis at trial. A witness's testimony against a defendant is inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36 (2004). Here, the State submitted lab reports instead of live testimony of lab analyst to establish identity and weight of cocaine. The lab reports were sworn to before a notary public by analysts at the State Lab and were conclusory in that they identified the material tested as cocaine of a certain weight. The reports were made in response to a police request, and even if they were volunteered, it would not make the reports any less testimonial. These lab reports were affidavits in which the lab analyst provides the precise testimony that he or she would be expected to provide if called at trial. These lab reports are functionally identical to live, in-court testimony, and thus, are testimonial.

Admission of a lab report through a supervisor who did not observe or participate in the testing, when the defendant has not had the opportunity to cross-examine the analyst who performed the testing and the analyst is not

shown to be unavailable, violates the defendant's right to confrontation under the Sixth Amendment. Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011).

Cf. Pendergrass v. State, 913 N.E.2d 703 (Ind. 2009) *cert. denied,* 560 U.S. 965 (defendant's Sixth Amendment right to confrontation was not violated by the introduction of a certificate of analysis and DNA profiles through the testimony of a laboratory supervisor and not the analyst who conducted the DNA testing, even though the State lab analyst's affidavits are testimonial. But see Speers v. State, 999 N.E.2d 850 (Ind. Ct. App. 2013) (recognizing that Pendergrass was "undermined" by Bullcoming v. New Mexico*,* 131 S. Ct. 2705 (2011)).

A defendant can waive her Confrontation rights if the State gives statutory notice of its intent to use a report or certificate of analysis and the defendant does not file a timely demand for cross-examination of the preparer. See IC 35-36-11 (defendant must file demand within 10 days of receiving prosecutor's notice).

An expert may testify to an opinion based on facts the expert assumes, but does not know, to be true, without violating the Confrontation Clause. It is then up to the party calling the expert to introduce other evidence establishing the assumed facts. Williams v. Illinois, 132 S. Ct. 2221 (2012) (Confrontation Clause not violated by expert's testimony that a DNA profile from an outside laboratory 'matched' the victim and defendant although she did not conduct or observe any of the testing herself).

See also Howard v. State, 853 N.E.2d 461 (Ind. 2006). In the situation of child witnesses or protected person witnesses, the burden is still on the proponent of the testimony, generally the State, to prove the unavailability of the witness. Unlike adults, under I.C. 35-37-4-6, a determination that a child witness is unavailable must be predicated only upon a trial court's finding: (1) from testimony of a psychiatrist, physician, or psychologist and other evidence, if any, that the child will suffer emotional distress such that she cannot reasonably communicate if testifying in the physical presence of the defendant; (2) the child cannot participate at trial for medical reasons; or (3) the child is legally incompetent to testify.

See also Jackson v. State, 891 N.E.2d 657 (Ind. Ct. App. 2008), *trans. denied*. Defendant was denied his Sixth Amendment right to confront witnesses where the trial court admitted a laboratory report prepared by a technician who did not testify. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation. Crawford v. Washington, 541 U.S. 36 (2004). Defendant was charged with Class A felony cocaine dealing. At trial, the Indiana State Police Lab supervisor, and not the lab tech who performed the analysis and prepared the lab report establishing that the substance was cocaine and the weight of the substance, testified. Because lab report was prepared pursuant to police investigation and was introduced by the prosecution to establish element of a charged crime, the lab report was testimonial. The testimony of

the lab supervisor was insufficient to satisfy Defendant's right to confrontation. Given the nature of the testing, only the technician who performed the test could testify whether she correctly followed each step in the process. Thus, trial court abused its discretion in admitting the lab report into evidence.

> See also McMurrar v. State, 905 N.E.2d 527 (Ind. Ct. App. 2009) (because quality assurance manager was merely a sponsoring witness of the lab report and did not perform tests herself, her testimony did not satisfy Defendant's right of confrontation under Crawford).
>
> Cf. Koenig v. State, 933 N.E.2d 1271 (2010) (allowing lab report showing methadone in deceased victim's blood admitted through coroner rather than analyst was constitutional error, but harmless beyond a reasonable doubt); see also Torres v. State, 12 N.E.3d 272 (Ind. Ct. App. 2014).
>
> See also Bond v. State, 925 N.E.2d 773 (Ind. Ct. App. 2010) (admission of expert fingerprint analysis did not violate defendant's Sixth Amendment confrontation rights, even though one fingerprint analyst did not testify; results of examiner who did not testify were not introduced).
>
> But see State v. Laturner, 218 P.3d 23 (Kan. 2009) (portion of state statute that allowed admission of lab report without testimony of person preparing the report if a defendant failed to specify *grounds* before trial for Confrontation Cause objection violated Confrontation Clause of Sixth Amendment based on Crawford v. Washington, 541 U.S.2 36 (2004).

The Indiana Supreme Court's burden-switching to the Defendant to prove a state's witness is unavailable in order to support a Sixth Amendment objection is inconsistent with Melendez-Diaz. See Fowler v. State, 829 N.E.2d 459 (Ind. 2005). "Converting the prosecution's duty under the Confrontation Clause into the defendant privilege under state law or the Compulsory Process Clause shift the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses." Melendez-Diaz, 129 S. Ct. at 2540.

Fowler contravenes U.S. Supreme Court authority by switching the burden from the prosecution to the defense to prove unavailability. Although Fowler acknowledges that Crawford did nothing to alter the principles governing declarants who are available for cross-examination at trial, it is inconsistent with the long-standing rule that under the Confrontation Clause, deposition testimony of absent witness must bear sufficient indicia of reliability and the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant.

See also:

Jackson v. State, 735 N.E.2d 1146 (Ind. 2000) (inquiry is whether State made good faith effort to obtain absent witness' attendance at trial and where it has not, absent witness was not unavailable and admitting his deposition into evidence violated Sixth Amendment right of confrontation);

McGaha v. State, 926 N.E.2d 1050 (Ind. Ct. App. 2010) (where State made no effort to obtain expert for trial, State failed to show expert was unavailable and the admission of the expert's deposition violated Sixth Amendment even though Defendant had prior opportunity to cross-examine expert; however, error was harmless)

Beldon v. State, 906 N.E.2d 895 (Ind. Ct. App. 2009), *trans. granted and sum. aff'd*, 926 N.E.2d 480, 482 n.6 (Ind. 2010) (doctor's busy work schedule was insufficient to circumvent constitutional right to confrontation, but error was harmless);

Tiller v. State, 896 N.E.2d 537 (Ind. Ct. App. 2008) (implicitly requiring State to prove that victim was unavailable for trial, Court of Appeals held that State's efforts at securing victim's attendance at trial were sufficient to find the victim unavailable under both the US and Indiana constitutions and to allow the victim's deposition to be read into evidence); see also Davis v. State, 13 N.E.3d 939 (Ind. Ct. App. 2014).

Garner v. State, 777 N.E.2d 721 (Ind. 2002) (mere vacation is not sufficient to circumvent the defendant's right to confrontation).

The Supreme Court has "imposed a heavy burden on the prosecution either to secure the presence of the witness or to demonstrate the impossibility of that endeavor. Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980), *overruled on other grounds*, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

The inquiry is whether the State has made good faith effort to obtain the absent witness' attendance at trial. Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318 (1968); Jackson v. State, 735 N.E.2d 1146 (Ind. 2000).

But see McGaha v. State, 926 N.E.2d 1050 (Ind. Ct. App. 2010) (admission of medical examiner's deposition violated Sixth Amendment but error was harmless; it was unlikely that deposition impacted jury such that Defendant's rights were adversely affected).

The Rules of Evidence have always required the party offering hearsay to *establish the foundation for the admission.* See, e.g., Combs v. State, 895 N.E.2d 1252 (Ind. Ct. App. 2008), *trans. denied* (trial court abused discretion in admitting blood test results where State did not lay foundation that

medical technologist who drew the blood was acting under direction of or a protocol prepared by a physician); State v. Hunter, 898 N.E.2d 455 (Ind. Ct. App. 2008) (inadequacy of foundation even more pronounced because State provided no evidence that nurse was "a person trained in obtaining bodily samples"); and Shepherd v. State, 690 N.E.2d 318 (Ind. Ct. App. 1998), *trans. denied* (officer complied with requirements of Ind. Code 9-30-6-6 by advising hospital of reason for blood test).

Cf. Reemer v. State, 835 N.E.2d 1005 (Ind. 2005) (self-authentication rules relieve this burden in certain situations); Bailey v. State, 806 N.E.2d 329 (Ind. Ct. App. 2004) (business record exception).

At least two other States have rejected the burden shifting approach taken by the Indiana Supreme Court. State v. Cox, 876 So.2d 932 (La. App. 2004); Bratton v. State, 156 S.W.3d 689 (Tex. App. 2005).

(ii) Child witnesses/protected persons

However, in the situation of child witnesses or protected person witnesses, the burden is still on the proponent of the testimony, generally the State, to prove the unavailability of the witness. Unlike adults, under I.C. 35-37-4-6, a determination that a child witness is unavailable must be predicated only upon a trial court's finding: (1) from testimony of a psychiatrist, physician, or psychologist and other evidence, if any, that the child will suffer emotional distress such that she cannot reasonably communicate if testifying in the physical presence of the defendant; (2) the child cannot participate at trial for medical reasons; or (3) the child is legally incompetent to testify. Howard v. State, 853 N.E.2d 461 (Ind. 2006).

Howard v. State, 853 N.E.2d 461 (Ind. 2006) (child was not unavailable when she became too emotional to testify despite encouragement from both parties and the trial court; because no psychologist or psychiatrist testified as required by I.C. 35-37-4-6, child's deposition should not have been admitted into evidence). But see Guy v. State, 755 N.E.2d 248 (Ind. Ct. App. 2001).

(c) Prior opportunity to cross-examine

The teachings of Crawford demand a higher standard of cross examination for out of court testimonial statements than non-testimonial statements because testimonial statements implicate to a greater extent confrontation concerns. Anderson v. State, 833 N.E.2d 119, 126 (Ind. Ct. App. 2005) (*quoting* Purvis v. State, 829 N.E.2d 572, 583-84 (Ind. Ct. App. 2005)).

Howard v. State, 853 N.E.2d 461 (Ind. 2006) (even a deposition taken for discovery purposes provides the defendant with a full, fair, and adequate opportunity to confront and cross-examine a witness, within the meaning of the Sixth Amendment).

Morgan v. State, 903 N.E.2d 1010 (Ind. Ct. App. 2009), *trans. denied* (defendant's motive to cross State's witness in his deposition was substantially similar to motive to cross witness at trial, and thus, the admission of the missing State's witness deposition did not violate Sixth Amendment and Indiana Rule of Evidence 804).

But see State v. Lopez, 974 So.2d 340 (Fla. 2008) (defense counsel's ability to cross-examine a complainant during a discovery deposition does not provide the opportunity for confrontation required by the Sixth Amendment to render testimonial hearsay admissible at a criminal trial; questioning must not only permit the cross-examiner '"to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness,'" Court noted, *quoting* Davis v. Alaska, 451 U.S. 308 (1974), a defense attorney cannot be expected to be prepared to cross-examine a witness about matters that the attorney is learning about for the first time at the deposition). The Florida Supreme Court reaffirmed this holding in Corona v. State, 64 So.3d 1232 (Fla. 2011).

However, while not providing a precise test for adequate opportunity, a witness unable to appreciate the obligation to testify truthfully cannot be effectively cross-examined for Crawford purposes. Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005).

Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005) (crossing child witness at competency hearing at which child was determined incompetent did not provide adequate opportunity for cross to satisfy the Confrontation Clause). See also Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005).

Although a defendant still has a prior opportunity to cross a witness despite the fact that the witness lacks a memory as to the content of a prior statement, a defendant is denied the opportunity to cross a witness on a statement if the witness does not even remember making the statement. See, e.g., U.S. v. Owens, 484 U.S. 554, 558, 108 S. Ct. 838 (1988) (prior opportunity to cross despite the fact the witness did not remember the content of the statement). Because a witness who does not have memory of having a conversation cannot be crossed, a prior statement may not be used as substantive evidence if the declarant (1) denies making the statement or (2) denies memory of making the statement. See, e.g., Brown v. State, 671 N.E.2d 401, 406-07 (Ind. 1996).

PRACTICE POINTER: Although the opportunity to cross examination may be sufficient to satisfy the requirements of Indiana Rule of Evidence 801 or the Protected Persons statute, the same facts may not be sufficient to satisfy the confrontational clause requirement. See, e.g., Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005).

(2) Non-testimonial hearsay

Although the "indicia of reliability" test set forth, in Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980), and White v. Illinois, 112 S. Ct. 736, 502 U.S. 346 (1992), has been disapproved of in Crawford, *supra*, for testimonial hearsay, the test may still be applicable to determine whether non-testimonial hearsay violates the Sixth Amendment right to cross-examine. Crawford, 124 S.Ct. at 1370; United States v. Thomas, 453 F.3d 838 (7th Cir. 2006).

The proponent of a hearsay statement must prove that the statement bears adequate indicia of reliability. Reliability may be inferred if a statement falls within a firmly rooted hearsay exception. If the hearsay exception fails to qualify as firmly rooted, the proponent must show particularized guarantees of trustworthiness which include only the circumstances surrounding the making of the statement and that render the declarant particularly worthy of belief. Holmes v. State, 671 N.E.2d 841, 859 (Ind.1996); Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999).

> Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999) (out of court statements made by accomplice that inculpated the defendant and shifted blame from the accomplice were not statements against penal interest and, thus, did not fall under a firmly rooted hearsay exception nor had a sufficient indicia of reliability).

b. Indiana Constitutional right to confront witnesses face-to-face

The Indiana constitutional right to confrontation affords greater protection than the Sixth Amendment constitutional right. Article 1 Section 13 of the Indiana Constitution provides that "in all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face." Brady v. State, 575 N.E.2d 981, 985 (Ind. 1991). In order for hearsay to be admissible under Article 1, Section 13 of the Indiana Constitution, the defendant must also be given the opportunity to "meet the witness face-to-face." Pierce v. State, 677 N.E.2d 39, 49 (Ind. 1997). In fact, the Indiana Constitution protects two separate rights: (1) the right to cross-examination, generally performed by the defendant's attorney, and (2) the right to physical confrontation (by the defendant). Id.; Brady v. State, 575 N.E.2d at 988.

> Miller v. State, 517 N.E.2d 64 (Ind. 1987) (deposition of child victim witness was not admissible when the defendant was denied right to be present or to cross-examine at deposition, at pre-trial competency hearing, and at trial, under Indiana Constitution).

The Indiana provision guarantees face-to-face confrontation of "witnesses," not the hearsay declarant.

> Ward v. State, 50 N.E.3d 752, 756 (Ind. 2016) (because forensic nurse recounting domestic battery victim's out-of-court statements testified under oath at trial, defendant's state confrontation rights were not violated).

(1) Cross-examination

The right places a premium upon live testimony of the State's witnesses in the courtroom during trial, as well as upon the ability of the defendant and his counsel to fully and effectively probe and challenge those witnesses during trial before the trier of fact through cross-examination. Brady v. State, 575 N.E.2d 981, 988 (Ind. 1991).

Owings v. State, 622 N.E.2d 948 (Ind. 1993) (admission at trial of deposition which defendant was not permitted to attend, taken by State and given by witness unavailable for trial, results in the defendant never having opportunity to confront that witness; such procedure may violate the defendant's right to confrontation; however, here, where defendant did not object to the deposition without him, there was a waiver of his Sixth Amendment right).

(2) The right to meet witness face-to-face

The defendant's right to meet the witnesses face-to-face has not been subsumed by the right to cross-examination. Merely ensuring that a defendant's right to cross-examine the witness is scrupulously honored does not guarantee that the requirements of Indiana's Confrontation Clause are met. The Indiana Constitution recognizes that there is something unique and important in requiring the face-to-face meeting between the accused and the State's witnesses as they give their trial testimony. While the right to cross-examination may be the primary interest protected by the confrontation right in Article 1, Sec. 13 of the Indiana Constitution, the defendant's right to meet the witnesses face to face cannot be read out of our State's Constitution. Brady v. State, 575 N.E.2d 981, 988 (Ind. 1991).

The right to confront witnesses face-to-face is secured where the: (1) testimony of a witness at a former hearing or trial on the same case is reproduced and admitted; (2) defendant either cross-examined such witness or was afforded an opportunity to do so; and (3) witness cannot be brought to testify at trial again because he has died, become insane, or is permanently or indefinitely absent from the state and is therefore beyond the jurisdiction of the court in which the case is pending. An opportunity for cross-examination in a prior civil case, however, will not suffice to make the testimony admissible in a criminal case. Brady v. State, 575 N.E.2d 981, 987 (Ind.1991).

Driver v. State, 594 N.E.2d 488 (Ind. Ct. App. 1992) (admission into second trial of now deceased witness's testimony from first trial in which the defendant was denied his right to be present violated the defendant's right to face-to-face confrontation).

Jones v. State, 445 N.E.2d 98 (Ind. 1983) (where witness later testifies against the defendant at trial, court-ordered absence of the defendant at taking of deposition does not violate the defendant's right to confront witnesses).

Stranger v. State, 545 N.E.2d 1105 (Ind. Ct. App. 1989), *overruled on other grounds by* Smith v. State, 689 N.E.2d 1238 (Ind. 1997) (defendant's right to

confront witnesses was not denied when trial court allowed child witness to sit with chair turned slightly toward jury and away from the defendant).

Williams v. State, 698 N.E.2d 848 (Ind. Ct. App. 1998) (although the witness was unable to remember prior hearsay statement, the defendant still had the opportunity to meet the witness face-to-face, to cross-examine him regarding prior statement, and to allow jury to judge witness's demeanor and credibility in answering his questions).

(3) Waiver of right

Failure to request the opportunity to cross-examine a witness at trial called by the opposing party waives the right. A trial judge has no affirmative duty to ascertain whether a defendant is passing up cross-examination because of tactical considerations or through oversight or error. Pierce v. State, 677 N.E.2d 39 (Ind.1997).

A defendant can waive his right to confrontation by failing to attend a deposition, or by being excluded from a deposition without objecting. State v. Owings, 622 N.E.2d 948 (Ind. 1993) (DeBruler, J., dissenting on basis that waiver of right to confrontation and cross-examination must be a knowing and voluntary relinquishment); Mathews v. State, 26 N.E.3d 130 (Ind. Ct. App. 2015) (defendant declined State's invitation to attend unavailable victim's deposition, which was conducted via Skype).

2. Defendant's evidence- Evidence Rules trumped by the right to present a defense

The Confrontation Clause does not bar the use of hearsay evidence *by the defendant*. Although hearsay offered by the defendant is normally subject to the evidence rules, due process may require the admission of trustworthy evidence offered by the defendant even when its use would otherwise violate the hearsay rules. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (1973), but see Griffin v. State, 763 N.E.2d 450 (Ind. 2002).

A defendant's right to a meaningful opportunity to present a complete defense cannot be abridged by evidence rules that are arbitrary or disproportionate to the purposes they are designed to serve. Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727 (2006) (*citing* to Washington v. Texas, 388 U.S. 14 (1967), Chambers v. Mississippi, 410 U.S. 284 (1973), Crane v. Kentucky, 476 U.S. 683 (1986), and Rock v. Arkansas, 483 U.S. 44 (1987), as examples of arbitrary evidence rules, i.e., rules that excluded important defense evidence but that did not serve any legitimate interests).

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038 (1973) (rule prohibiting impeachment of own witness denied due process to the defendant who sought to cross-examine a witness he claimed had confessed to the crime with which the defendant was charged and call three other witnesses that would have testified this witness had confessed to them on three separate occasions).

As long as evidence of a third party's guilt meets the relevancy test under Indiana Rules of Evidence 401, 402 and 403, the evidence is admissible to guarantee the Defendant's right to

present a defense. Joyner v. State, 678 N.E.2d 386 (Ind. 1997); see also Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727 (2006).

Allen v. State, 813 N.E.2d 349 (Ind. Ct. App. 2004) (trial court erroneously excluded prior testimony that a third party made statements to the witness implicating himself in the murders; witness's testimony was exculpatory, unique, and critical to defense as there was no other source for the defendant to rely upon to present this part of his defense that another individual had committed crimes).

Joyner v. State, 678 N.E.2d 386 (Ind. 1997) (reversible error to prohibit the defendant's evidence supporting his theory that another person committed the murder; defendant sought to present evidence that: a third party, who worked at same place as the victim and the defendant, was having affair with victim; the third party had sex with victim on night before murder; and the third party had lied to his wife about where he was that evening and later told his wife that he had an argument with victim on the last day she was seen alive; and the third party came in late to work on the morning after the murder and lied about his tardiness on his time card).

There are four factors to consider when determining whether statements by a third-party admitting guilt are admissible: (1) whether the confession was made spontaneously to a close acquaintance shortly after the murder occurred; (2) whether each statement was support by other evidence in the trial; (3) whether the confession was against the third party's interest; and (4) whether the third party was present and could be cross examined. Griffin v. State, 763 N.E.2d 450, 455 (Ind. 2002) (Boehm, J., dissenting) (*citing* Chambers v. Mississippi, 410 U.S. at 300-01).

Thomas v. State, 580 N.E.2d 224 (Ind. 1991) (jailhouse confession to crime by original suspect of crime was admissible as statement against penal interest and under Sixth Amendment).

Griffin v. State, 763 N.E.2d 450, 455 (Ind. 2002) (third party's admission of guilt to attorney did not sufficiently meet the Chambers requirements for admissibility; Boehm, J., dissenting).

Cook v. State, 119 N.E.3d 1092 (Ind. Ct. App. 2019) (no error in excluding double hearsay statements that another person had allegedly confessed to killing; evidence had little or no bearing on detective's particular course of action during investigation).

Even false statements made by a third party may make it more probable that the third party committed the crime in that they show an effort to conceal the crime. See, e.g., Grimes v. State, 450 N.E.2d 512 (Ind. 1983) (to the extent the defendant's exculpatory statements to police were false, they were properly admitted to show his consciousness of guilt).

Further, statements by a third party that implicate the third party are also Brady material and must be disclosed to the defense. Prewitt v. State, 819 N.E.2d 393 (Ind. Ct. App. 2004); Bowlds v. State, 834 N.E.2d 669 (Ind. Ct. App. 2005).

III. HEARSAY EXCEPTIONS: AVAILABILITY OF DECLARANT IMMATERIAL - RULE 803

A. OFFICIAL TEXT:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(1) Present Sense Impression. A statement describing or explaining an event, condition, or transaction, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, design, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made by a person seeking medical diagnosis or treatment;

(B) is made for - and is reasonably pertinent to — medical diagnosis or treatment; and

(C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause.

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by — or from information transmitted by — someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(9) or (10) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) Public Records.

(A) A record or statement of a public office if:

(i) it sets out:

(a) the offices regularly conducted and regularly recorded activities;

(b) a matter observed while under a legal duty to [observe and] report; or

(c) factual findings from a legally authorized investigation; and

(ii) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(B) Notwithstanding subparagraph (A), the following are not excepted from the hearsay rule:

(i) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case;

(ii) investigative reports prepared by or for a public office, when offered by it in a case in which it is a party;

(iii) factual findings offered by the government in a criminal case; and

(iv) factual findings resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case.

(9) Public Records of Vital Statistics. A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony or a certification under Rule 902 that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or

similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn, crypt, or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose - unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that is at least thirty (30) years old and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination;

(B) the statement contradicts the expert’s testimony on a subject of history, medicine, or other science or art; and

(C) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage - or among a person's associates or in the community -

concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation

B. RULE 803 GENERALLY

1. Rationale for hearsay rule and exceptions: reliability

The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed by the test of cross-examination. In a given case, however, it may be sufficiently clear that the statement offered is free enough from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination is unnecessary. Idaho v. Wright, 497 U.S. 805, 819, 110 S. Ct. 3139 (1990). However, when testimonial hearsay is offered against a criminal defendant, no judicial finding of reliability can substitute for the constitutionally guaranteed right of cross-examination. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

Each specific exception to the hearsay rule contains requirements designed to ensure the trustworthiness of the evidence. A piece of evidence that may be argued to fit within the specific language of the rule may nonetheless be inadmissible hearsay because of its inherent unreliability. Stahl v. State, 686 N.E.2d 89 (Ind. 1997) (circumstances under which an affidavit was given do not establish sufficient indicia of truthfulness to be admissible under

803(15) exception to hearsay); 5 *Weinstein's Federal Evidence,* Sec. 802.05(4)(a) (2d ed. 1997).

2. Admissibility under Rules and Sixth Amendment

Persons accused of crime are guaranteed the rights of effective confrontation and cross-examination by the U.S. and Indiana constitutions. Evidence which may be admitted under a hearsay rule exception must also be separately tested to determine whether it violates the defendant's rights to confrontation and cross-examination. Holmes v. State, 671 N.E.2d 841, 859 (Ind. 1996).

a. Non-testimonial hearsay: proponent must show indicia of reliability

The proponent of a hearsay statement must prove that the statement bears adequate indicia of reliability. Reliability may be inferred if a statement falls within a firmly rooted hearsay exception. If the hearsay exception fails to qualify as firmly rooted, the proponent must show particularized guarantees of trustworthiness which include only the circumstances surrounding the making of the statement and that render the declarant particularly worthy of belief. Holmes v. State, 671 N.E.2d 841, 859 (Ind.1996); see also Lilly v. Virginia, 527 U.S. 116, 119 S.Ct. 1887 (1999) (discussion of "firmly rooted" hearsay exceptions).

b. Testimonial hearsay: must have had an opportunity to cross-examine

The Confrontation Clause of the Sixth Amendment to the federal constitution bars admission of testimonial hearsay in criminal cases against a defendant who has not had the opportunity to cross-examine the declarant, even when the evidence might be admissible under the hearsay rules. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1374 (2004). When testimonial hearsay is offered against a criminal defendant, no judicial finding of reliability can substitute for the constitutionally guaranteed right of cross-examination. Id.

For a more detailed analysis of the constitutional implications of hearsay, see this Chapter, Subsection Admissibility of Hearsay - Rule 802, *supra*, and the applicable specific exception to the hearsay rule.

PRACTICE POINTER: Hearsay, like other evidence, must be relevant and not more unfairly prejudicial than probative to be admissible.

C. SPECIFIC EXCEPTIONS

1. Present sense impression - Rule 803(1)

A statement describing or explaining an event, condition, or transaction, made while or immediately after the declarant perceived it. Ind. Evid. Rule 801(1).

a. Rationale

The underlying rationale of this exception is that substantial contemporaneity of event and statement minimizes unreliability due to defective recollection or conscious fabrication. United States v. Parker, 936 F.2d 950 (7th Cir.1991).

Mack v. State, 23 N.E.3d 742 (Ind. Ct. App. 2014) (Rule 803(1) is based on the assumption that the lack of time for deliberation provides reliability).

b. Foundation

Indiana Rule of Evidence 801(1) requires that the statement describe or explain the event or condition during or immediately after its occurrence and the statement be based on the declarant's perception. Jones v. State, 780 N.E.2d 373 (Ind. 2002).

(1) Little time lapse between statement and event

There is no *per se* rule indicating what time interval is too long under Rule 803(1). United States v. Parker, 936 F.2d 950 (7th Cir.1991). However, where there is no evidence as to the lapse of time between the event and the statement, there is no foundation to admit the statement under this exception. United States v. Cruz, 765 F.2d 1020 (11th Cir.1985); Wood v. D.W. ex rel. Wood, 47 N.E.3d 12 (Ind. Ct. App. 2015).

Hurt v. State, 151 N.E.3d 809 (Ind. Ct. App. 2020) (present sense impression exception inapplicable where C.W. did not make her statements to police either during or immediately after she was injured, and given her multiple explanations for how she suffered the injuries to her nose and mouth, C.W. had time to deliberate before she spoke to police; also her ability to deliberate was hindered by her state of intoxication but she was still able to consider her responses to the officer's question);

United States v. Cruz, 765 F.2d 1020 (11th Cir.1985) (statement by deceased officer to his superiors regarding source of cocaine was inadmissible where it was unclear how much time elapsed between the receipt of cocaine and statement).

Mack v. State, 23 N.E.3d 742 (Ind. Ct. App. 2014) (informant's statement to police about what defendant told him inside of home was not "immediately after" the informant's perception and thus did not constitute a present sense impression).

United States v. Parker, 936 F.2d 950 (7th Cir. 1991) (baggage handler's statement that a suitcase belonged to defendant was admissible under Federal Rule 803(1); time elapsed was only that required to carry suitcase from train to baggage claim area).

Truax v. State, 856 N.E.2d 116 (Ind. Ct. App. 2006) (officer's notes that he wrote while negotiating with defendant during a police standoff were admissible as present sense impression, even if they were inadmissible as public document).

Jones v. State, 697 N.E.2d 53 (Ind. 2002) (upon seeing her landlord, victim remarked to her friend that he was her landlord and that she was afraid of him; victim's assertion identifying person driving by as her landlord satisfied Rule 803(1) exception, but assertion in which she expressed fear of her landlord did not satisfy this hearsay exception because it did not describe event, condition, or transaction *contemporaneously* perceived).

Amos v. State, 896 N.E.2d 1163 (Ind. Ct. App. 2009), *trans. denied* (victim's statement to her sister over the telephone that the person on the other line was defendant who told her that he wanted money and that if she did not give him some, he would kill her was admissible as a present sense impression).

Where the statement is offered under Rule 803(1) to describe or explain the material event of the crime, the statement must have been made during the commission of the crime or immediately thereafter. Jackson v. State, 697 N.E.2d 53 (Ind. 1998).

Jackson v. State, 697 N.E.2d 53 (Ind. 1998) (defendant's statements when he learned of the victim's death were made hours after the crime, and thus, were not admissible under 803(1)).

Stott v. State, 174 N.E.3d 236 (Ind. Ct. App. 2021) (audio recording of police-officer radio traffic that began after the truck fled the traffic stop constituted inadmissible hearsay and State failed to demonstrate that the present sense impression hearsay exception applied; it was unclear whether the witnesses made the statements to police during or immediately after the events described or whether the witnesses personally perceived those events; and at least one anonymous declarant had time to deliberate).

(2) Personal knowledge of declarant

Declarant must have first-hand knowledge of the event, condition, or transaction described or explained. Bemis v. Edwards, 45 F.3d 1369, 1373 (9th Cir. 1995); Stott v. State, 174 N.E.3d 236 (Ind. Ct. App. 2021).

2. Excited utterance - Rule 803(2)

A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused. Ind. R. Evid. 803(2).

a. Rationale

"The absence of opportunity for reflection is thought to vest excited utterances with reliability sufficient to warrant an exception to the hearsay rule." Miller, *Courtroom Handbook on Indiana Evidence* 304 (2016-17 edition) (*citing* Idaho v. Wright, 497 U.S.

805, 819, 110 S. Ct. 3139, 3149 (1990) (holding that the Confrontation Clause barred admission of certain child hearsay statements)).

b. Foundation

(1) Under Ind. R. Evid. 803(2)

For a hearsay statement to be admitted as an excited utterance, three elements must be shown:

(1) A startling event or condition occurs.

(2) The statement is made by a declarant while under the stress of excitement caused by the event or condition.

(3) The statement relates to the event or condition.

Application of these criteria is not mechanical. The heart of the inquiry is whether the statement is inherently reliable because the declarant was incapable of thoughtful reflection. Montgomery v. State, 694 N.E.2d 1137 (Ind. 1998); Davenport v. State, 749 N.E.2d 1144, 1148 (Ind. 2001).

Caution to trial courts from Indiana Supreme Court: "We have addressed in several decisions whether a shooting victim's identification of the assailant was properly admitted as an excited utterance under common law. In nearly every instance, we held the statement to be admissible…[However], trial courts should not abdicate rational analysis in cases where a shooting victim has fingered a possible perpetrator. Fairness to the defendant requires an assessment of whether the declarant's statement was the product of reflective thought." Yamobi v. State, 672 N.E.2d 1344, 1346-47 (Ind. 1996). See also Michigan v. Bryant, 131 S.Ct. 1143 (2011).

(a) Startling event

A startling event must occur.

Montgomery v. State, 694 N.E.2d 1137 (Ind. 1998) (being shot is a traumatic experience, both psychologically and physically); see also Stinson v. State, 126 N.E.3d 915 (Ind. Ct. App. 2019) (stabbing).

McMillen v. State, 169 N.E.3d 437 (Ind. Ct. App. 2021) (officer's body camera evidence showing witness's crying and visibly injured after altercation properly admitted).

To be admissible under the excited utterance exception to the hearsay rule, the statement must have been based on the declarant's personal knowledge of the startling event, not conjecture or speculation.

Noojin v. State, 730 N.E.2d 672 (Ind. 2000) (declarant's statement that defendant was the killer was an assumption, not based on personal knowledge, and thus, inadmissible).

(b) Timing: statement made during stress of excitement

The statement must be trustworthy under the facts of the particular case. The trial court must assess: (1) whether the statement was made while the declarant was under the influence of the excitement engendered by the startling event; and (2) whether the declarant's statement was the product of reflective thought. Yamobi v. State, 672 N.E. 2d 1344, 1346-47 (Ind.1996). In some cases, reviewing courts have held hearsay declarations made minutes after the startling event to be inadmissible. However, in other cases statements made hours after the event were admitted. The central issue is whether the declarant was still under the stress of excitement caused by the startling event when the statement was made. Yamobi v. State, 672 N.E. 2d 1344, 1346 (Ind.1996) (*citing* 13 Miller, *Indiana Evidence,* 607 § 803.102 (2d ed.)); Taylor v. State, 697 N.E.2d 51 (Ind. 1998); Montgomery v. State, 694 N.E.2d 1137 (Ind. 1998).

(i) Time lapse between startling event and statement

The proponent must present evidence of how much time elapsed between the startling event and statement. "Although lapse of time is not a dispositive factor, admitting a hearsay statement relating to a startling event with no foundational evidence regarding when the event occurred would undermine the rationale for the excited utterance exception to the hearsay rule." Wood v. D.W., 47 N.E.3d 12, 15 (Ind. Ct. App. 2015), *transfer granted, reinstated by* A.W. v. R.W., 2016 Ind. LEXIS 396 (Ind. 2016).

Bryant v. State, 984 N.E.2d 240, 247 (Ind. Ct. App. 2013) (victim's statement to a detective about being stabbed was not admissible as an excited utterance where the State failed to establish how much time elapsed between the stabbing and the statement).

Marcum v. State, 772 N.E.2d 998 (Ind. Ct. App. 2002) (statement given to police 2 ½ days after alleged battery during which time alleged victim had been out to a bar was not made under stress of excitement caused by event).

(ii) Severity of the startling event

The greater the stress caused by the startling event, the longer the effects of the stress may last. Jones v. State, 800 N.E.2d 624 (Ind. Ct. App. 2003).

Lieberenz v. State, 717 N.E.2d 1242 (Ind. Ct. App. 1999) (where the rape encompassed a period of a number of hours, it was reasonable that the stress caused by the rape continued for a number of hours after the incident).

Williams v. State, 782 N.E.2d 1039 (Ind. Ct. App. 2003) (victim's statements made in emergency room after he was shot multiple times

were inherently reliable, despite fact that some time had passed since he was shot). See also Montgomery v. State, 694 N.E.2d 1137 (Ind. 1998).

Johnson v. State, 699 N.E.2d 746 (Ind. Ct. App.1998) (statement made by a rape victim to a nurse in a hospital over an hour after the rape is not *per se* an excited utterance but was found to be under the facts of this case). See also Carter v. State, 686 N.E.2d 834 (Ind.1997).

Williams v. State, 546 N.E.2d 1198 (Ind. 1989) (testimony about statement made by 3-year-old child that daddy shot mommy to paramedics who arrived to transport child's mother to hospital was admissible under excited utterance exception).

D.G.B. v. State, 833 N.E.2d 519 (Ind. Ct. App. 2005) (despite fact that complaining witness had undergone surgery and been put under anesthesia, statement to her mother was still under the stress of excitement caused by earlier molestation which caused the need for the surgery).

(iii) The declarant's demeanor

The ultimate issue is whether the statement is deemed reliable because of its spontaneity and lack of thoughtful reflection and deliberation. Mathis v. State, 859 N.E.2d 1275, 1279 (Ind. Ct. App. 2007).

A victim's statement to a detective about being stabbed was not admissible as an excited utterance under Ind. Evid. R. 803(2) where the declarant/victim spoke in a "low and slow" tone of voice and the State failed to establish how much time elapsed between the stabbing and the statement. Bryant v. State, 984 N.E.2d 240, 247 (Ind. Ct. App. 2013), *transfer denied*.

Hurt v. State, 151 N.E.3d 809 (Ind. Ct. App. 2020) (although C.W. suffered a startling or stressful event, she was not under stress from that event when she spoke to police at least 15 minutes after 911 call and therefore the statement was not admissible under the excited utterance exception; she also made statements to officer in response to his questioning and was deliberating—albeit drunkenly—about how to respond to repeated questioning over the course of several minutes);

Gordon v. State, 743 N.E.2d 376 (Ind. Ct. App. 2001) (where statement occurred only minutes after 911 call about battery and declarant was still visibly upset, statement was admissible).

Jones v. State, 800 N.E.2d 624 (Ind. Ct. App. 2003) (while the exact time of battery could not be established, fact that child was crying when he spoke to his mother and was upset when speaking with the officer made it reasonable to infer that child was still under stress from the startling event when he spoke to them both). See also Davis v. State, 796 N.E.2d 798 (Ind. Ct. App. 2003).

Mathis v. State, 859 N.E.2d 1275, 1282 (Ind. Ct. App. 2007) (Kirsch, C.J., dissenting on the basis that a witness who has calmed down and gained control of her emotions is no longer under the stress of the startling event and has had time for reflection and deliberation.)

But see Burdine v. State, 751 N.E.2d 260 (Ind. Ct. App. 2001) (complaining witness was still under stress of startling event when she made statement implicating the defendant, notwithstanding argument that the witness's quiet demeanor, interaction with other people and nap showed that witness was no longer feeling stress). See also McGrew v. State, 673 N.E.2d 787 (Ind. Ct. App. 1996), *sum. aff'd*, 682 N.E.2d 1289 (Ind. 1997).

(iv) Answer to question

A declaration does not lack spontaneity simply because it was an answer to a question. Whether given in response to a question or not, the statement must be unrehearsed and made while still under the stress of excitement from the startling event. Montgomery v. State, 694 N.E.2d 1137 (Ind.1998). See also Yamobi v. State, 672 N.E.2d 1344 (Ind.1996); Love v. State, 714 N.E.2d 698 (Ind. Ct. App. 1999); Williams v. State, 782 N.E.2d 1039 (Ind. Ct. App. 2003). But the form of the officer's questioning is a factor to be considered. Yamobi v. State, 672 N.E.2d 1344 (Ind.1996).

Cox v. State, 774 N.E.2d 1025 (Ind. Ct. App. 2002) (where officer asked visibly upset declarant a question about the incident, the declarant identified the defendant without the officer suggesting the defendant; thus, statement was admissible).

Yamobi v. State, 672 N.E.2d 1344 (Ind.1996) (victim's answer to officer's question "who shot you?" thirty minutes after shooting was admissible).

A declaration in response to suggestive questioning may lack the spontaneity required by this exception. See Burdine v. State, 751 N.E.2d 260 (Ind. Ct. App. 2001). Testimonial hearsay offered against the defendant is subject to Crawford v. Washington, *supra.*

(2) Confrontation Clause: has emergency passed?

Although the passage of time is not a determinative factor in the admissibility under the excited utterance exception set forth in the Rules of Evidence, the passage of time is extremely important in determining whether the hearsay is admissible under the Sixth Amendment Confrontation Clause. If a victim or witness gives a statement to a police officer or agent of the State after the emergency has ended, the statement is testimonial and inadmissible unless the defendant has had the opportunity to cross the declarant. Hammon v. Indiana & Davis v. Washington, 126 S. Ct. 2266 (2006) (*overruling* Hammon v. State, 829 N.E.2d 444 (Ind. 2005)). Thus, the cases, which

relied on Hammon v. State, 829 N.E.2d 444 (Ind. 2005), to find statements admissible after the emergency passed are questionable authority. See, e.g., Rogers v. State, 814 N.E.2d 695 (Ind. Ct. App. 2004); Wallace v. State, 836 N.E.2d 985 (Ind. Ct. App. 2005) (testimony of witnesses pertaining to victim's answers identifying the defendant as the shooter, were not "testimonial" statements; no evidence to suggest that EMT and emergency room nurse's inquiries of victim were taken with an eye toward trial).

Young v. State, 980 N.E.2d 412 (Ind. Ct. App. 2012) (domestic violence victim went to fire station across the street from her apartment for help. The firefighters questioned her to assess the situation. Her responses were non-testimonial and were within the excited utterance exception; the firefighters' testimony about her statements did not violate the defendant's Confrontation Clause rights. However, the victim's statements to a detective almost an hour later were testimonial; they were not made under the stress of the battery and were not focused on treating her injuries. Admitting the detective's testimony about those statements was error requiring reversal).

King v. State, 985 N.E.2d 755 (Ind. Ct. App. 2013) (police officer's testimony relating what battery victim said at scene was not testimonial based victim's visibly shaken demeanor, the proximity in time to the infliction of her injuries and the immediate possibility of danger to her child).

(3) 911 calls

911 calls generally will fit within the definition of "excited utterance." Porter v. State, 700 N.E.2d 805 (Ind. Ct. App.1998)

Porter v. State, 700 N.E.2d 805 (Ind. Ct. App.1998) (reviewing court found proper trial court's admission of audiotape of victim's 911 call of a burglary in her home in progress; burglary victim was transported to scene of defendant's arrest and identified him on-the-spot as the person who was burglarizing her home).

PRACTICE POINTER: Porter was decided before the Supreme Court decided Crawford, *supra*, and Hammon, *supra.* Thus, even 911 tapes admissible under 803(2) may violate the Sixth Amendment if the declarant did not testify.

A recording is not admissible unless the voices on the tape are identified. Circumstantial evidence may be used for identification purposes. Circumstantial evidence is sufficient for authentication where authorities responding to 911 call confirm substantive portions of events heard during the call. Johnson v. State, 699 N.E.2d 746 (Ind. Ct. App.1998).

Johnson v. State, 699 N.E.2d 746 (Ind. Ct. App.1998) (tape of eyewitness 911 call was not authenticated because there was no evidence that the voice heard on tape was the voice of the man whose name was given; however, the recording of the victim's 911 call was properly authenticated because the hysterical caller

identified herself by name and stated that she had been raped, remained continuously on the line until medical assistance arrived, and upon arrival, a member of the medical response team confirmed to the 911 operator that they had found the victim).

The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Davenport v. State, 749 N.E.2d 1144, 1148 (Ind. 2001) (*quoting* Ind. Evid. Rule 901(a)).

Teague v. State, 978 N.E.2d 1183 (Ind. Ct. App. 2012) (recording of 911 caller relaying injured burglary victim's statements to operator had multiple layers of hearsay, but each layer met a hearsay exception. The victim was distraught and screaming that her mother had been beaten up next door. The 911 caller was also under the stress of a startling event, having been awakened when the victim came to the door in the middle of the night).

c. Distinguishing present sense impression from excited utterance

An excited utterance must relate to a *startling* event or condition whereas a present sense impression may describe any event or condition. Rule 803(2). Further, an excited utterance must merely *relate to* the event whereas a present sense impression must *describe* the event. Rule 803(1). Both must be based on personal knowledge. Bemis v. Edwards, 45 F.3d 1369 (9th Cir. 1995).

3. Then existing mental, emotional, or physical condition - Rule 803(3)

A statement of the declarant's then-existing state of mind (such as motive, design, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. Ind. R. Evid. 803(3).

a. State of mind- in general

(1) Foundation

(1) The statement must assert the declarant's mental state

(2) The statement must be reasonably contemporaneous with the mental state sought to be proven.

(3) Declarant had no time to reflect (that is, no time to fabricate or misrepresent his thoughts).

(4) The declarant's state of mind must be relevant to an issue in the case.

Crawford v. State, 770 N.E.2d 775, 781 (Ind. 2002); Stewart v. State, 945 N.E.2d 1277, 1286-87 (Ind. Ct. App. 2011).

(2) Timeliness of statement: reasonably contemporaneous with state of mind

Statement must relate to the declarant's then-existing state of mind. A statement of memory offered after the fact to prove the fact remembered, i.e., that the defendant did not intend to kill the victim, is not within the exception. Jackson v. State, 697 N.E.2d 53 (Ind. 1998).

Jackson v. State, 697 N.E.2d 53 (Ind. 1998) (defendant's statement hours after the crime was not indicative of his then-existing state of mind but referred to his intention at the time of the crime.)

Hicks v. State, 690 N.E.2d 215, 223 (Ind. 1997) (although victim-declarant stated she was still upset with defendant, the gist of the conversation was about how victim felt at the time of her conversation with defendant, four hours before, and not of her "then existing" state of mind, as required by the exception.).

Moss v. Feldmeyer, 979 F.2d 1454 (10th Cir. 1992) (in malpractice action against doctor for misdiagnosis, defendant testified that he had encouraged patient to enter hospital and that she refused; patient's statements were admissible as statements of her then existing mental condition).

Heinzman v. State, 970 N.E.2d 214, 223-24 (Ind. Ct. App. 2012), *affirmed on transfer*, 979 N.E.2d 143 (Ind. 2012) (statements of the victim's then existing state of mind in a letter the victim wrote, but never sent to defendant, were not made inadmissible by Ind. Evid R. 803(3); other references in the letter to defendant's actions were cumulative of the victim's testimony and of other evidence at trial).

(3) Jury admonishment

If a statement is admitted as circumstantial evidence of the declarant's state of mind rather than as proof of the truth of the matter asserted, the judge must admonish the jury accordingly upon request. Ind. Evid. Rule 105; see also Lock v. State, 567 N.E.2d 1155, 1160 (Ind. 1991), *overruled on other grounds by*, Wheldon v. State, 765 N.E.2d 1276 (Ind. 2002).

b. Victim's state of mind

Hearsay testimony about a victim's state of mind may be admissible in three situations: (1) to show the intent of the victim to act in a particular way, (2) when the defendant puts the victim's state of mind in issue, (3) sometimes to explain physical injuries suffered by the victim. Hatcher v. State, 735 N.E.2d 1155, 1160-61 (Ind. 2000).

(1) When victim's state of mind is in issue

Admissibility under Rule 803(3) requires, among other things, that "the declarant's state of mind must be relevant to an issue in the case." Willey v. State, 712 N.E.2d 434, 444 (Ind. 1999).

"[T]he declarant's state of mind must be a contested, material issue for this exception to apply. Otherwise, it eviscerates the hearsay rule. . . Particular caution should be employed in criminal cases where the state of mind of the victim is raised. In some cases, the victim's state of mind will be material (e.g., self-defense cases, robbery by putting the victim in fear). In most cases, however, the victim's state of mind will not be a material element of a claim or self-defense." Committee notes, Ind. R. Evid. 803(3).

Jones v. State, 780 N.E.2d 373, n. 1 (Ind. 2002) (although victim's statement that she feared a third party may arguably have qualified as an exception to hearsay under IRE 803(3), the trial court did not abuse its discretion in finding that statement was not material).

(a) Victim's state of mind not relevant to prove defendant's intent

McGrew v. State, 673 N.E.2d 787 (Ind. Ct. App. 1986) (trial court erroneously admitted testimony by victim's friends regarding statements made by victim shortly after crime of rape; State failed to show any legal relevance, as victim's state of mind was not probative as to whether defendant acted knowingly or intentionally), *sum. aff'd*, 682 N.E.2d 1289.

(b) Victim's state of mind, i.e., fear of defendant, is generally not relevant

Although a statement concerning the victim's fear of the defendant falls under the state of mind exception, the victim's state of mind is generally not relevant to any issue at trial. Wrinkles v. State, 690 N.E.2d 1156 (Ind. 1997); Angleton v. State, 686 N.E.2d 803 (Ind. 1997).

Wrinkles v. State, 690 N.E.2d 1156 (Ind. 1997) (the victim's statement that she was fearful of the defendant was not relevant to any issue in the case, although the defendant, in opening, argued that the victim was the initial aggressor).

PRACTICE POINTER: A victim's hearsay statements offered to prove the defendant's state of mind and thus subsequent actions may be admissible being they are not offered to prove the truth of the matter. See, e.g., Whited v. State, 645 N.E.2d 1138 (Ind. Ct. App. 1995) (in rape trial, alleged victim's statements were admissible to show the defendant's state of mind where his defense was consent); Isaacs v. State, 659 N.E.2d 1036 (Ind. 1995) (where defendant was claiming self-defense, victim's statements to defendant offered to describe circumstances around death should have been admitted)

Hatcher v. State, 735 N.E.2d 1155 (Ind. 2000) (trial court erred in admitting testimony regarding deceased victim's statement that she feared that defendant would kill her); see also Kubsch v. State, 784 N.E.2d 905 (Ind. 2003).

(c) Victim's state of mind is not made relevant by State's theory of defendant's motive

Although the nature of the relationship between the victim and defendant may be relevant to motive, motive is not an exception to the hearsay rule. Hatcher v. State, 735 N.E.2d 1155, 1160-61 (Ind. 2000).

Hatcher v. State, 735 N.E.2d 1155 (Ind. 2000) (trial court erred in admitting testimony regarding deceased victim's statement that she feared that the defendant would kill her).

Smith v. State, 721 N.E.2d 213 (Ind. 1999) (victim's statement that he needed money to pay his dealer for drugs he had taken was irrelevant in murder case to rebut the defendant's theory that the victim was killed by a third party for money).

Jester v. State, 724 N.E.2d 235 (Ind. 2000) (victim's statement that she thought the defendant was having affair and she was considering leaving him was inadmissible because the defendant never put victim's state of mind into evidence).

Camm v. State, 908 N.E.2d 215 (Ind. 2009) (testimony of victim's friend that victim said she expected Defendant to arrive home between 7:00 p.m. and 7:30 p.m., where undisputed evidence established that murders occurred at 7:30 p.m., was inadmissible to prove the conduct of a third party, in this case, Defendant. Conviction reversed.)

(d) Victim's state of mind is relevant when placed into issue by defense

A victim's state of mind is relevant where it has been put in issue by the defendant. Angleton v. State, 686 N.E.2d 803 (Ind.1997). Exception applies if state of mind is one of the contested issues at trial. Statements made by a victim may be admitted to prove that the relationship between the defendant and the victim was not completely benign, if defendant claims they were benign at trial. Bacher v. State, 686 N.E.2d 791 (Ind.1997).

Angleton v. State, 686 N.E.2d 803 (Ind.1997) (victim's statements of intent to live on her own and her expressions of fear were relevant to rebut defense portrayal, in opening statement, of victim and defendant as a happy, loving couple). See also Vehorn v. State, 717 N.E.2d 869 (Ind. 1999); Pierce v. State, 705 N.E.2d 173 (Ind. 1998).

Bacher v. State, 686 N.E.2d 791 (Ind.1997) (victim's fear of defendant is evidence of the state of mind of the victim, citing to cases holding that relationship was contested issue; however, dissent found no relevance for victim's state of mind because volatile relationship, in this case, was not contested).

Willey v. State, 712 N.E.2d 434 (Ind. 1999) (victim's statements dealing with defendant's threats to victim were irrelevant to any issue in murder trial; both parties agreed that the victim and defendant were divorced, and their relationship was strained).

Mull v. State, 770 N.E.2d 308 (Ind. 2002) (hearsay testimony that victim thought the defendant was "strange," "weird," and that victim complained about the defendant's watching her and his repeated attempts to engage her in conversation was admissible because the defendant put victim's state of mind in issue by claiming sexual activity was consensual and that the victim admitted the defendant in her apartment).

Simmons v. State, 760 N.E.2d 1154 (Ind. Ct. App. 2002) (hearsay testimony that victim had told witnesses that she was fearful the defendant would kill her was inadmissible; victim's state of mind or fear of the defendant was never put at issue in case because main defense was alibi; it was undisputed the victim and defendant were engaged, and the victim broke it off).

The State cannot bootstrap the admissibility by the introduction of its own evidence by putting it in, forcing a denial, and then claiming it was put in issue by the defendant. Bassett v. State, 795 N.E.2d 1050, 1052 (Ind. 2003).

Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004) (the defendant did not put victim's state of mind in issue through his statements during interrogation about his relationship with his wife; the State introduced the defendant's statements; thus, the defendant's wife's hearsay statement that "history is repeating itself" was inadmissible).

Willey v. State, 712 N.E.2d 434 (Ind. 1999) (the defendant's testimony that he did not threaten the victim did not place victim's state of mind in issue because the improper hearsay concerning threats was admitted in State's evidence which was prior to the defendant's testimony).

Bassett v. State, 795 N.E.2d 1050 (Ind. 2003) (because the State was the first to put the defendant's relationship with the victim at issue, the hearsay statements of fear of the victim were not admissible).

(2) Victim's state of mind to show intent to act

Hearsay is admissible when it is offered to show the declarant's intention to commit a future act. Carter v. State, 501 N.E.2d 439 (Ind. 1986).

Carter v. State, 501 N.E.2d 439 (Ind. 1986) (statement by co-defendant that he "would have to check with his brother . . . to see if [cocaine] was available" made to officer who testified at trial fell under state of mind exception because it was introduced to show the co-defendant's intention to do further act, i.e., call his brother; however, statements that he did not have any cocaine, but he knew that his brother had some were not admissible).

PRACTICE POINTER: Some courts have been allowing a victim's hearsay statement regarding the victim's intent to act into evidence without any determination of relevancy. Just as a victim's state of mind concerning the victim's mental feelings, such as fear, must be relevant, a victim's state of mind concerning her intent to act must be reasonable. In Simmons v. State, 760 N.E.2d 1154 (Ind. Ct. App. 2002), a victim's hearsay statement that she broke off engagement with the defendant was irrelevant to any issue in the case. Arguably, if the victim would have said she intended to break off the engagement, the statement would not be any more relevant. Thus, just because the hearsay declarant may claim he or she intended to do an act does not make the hearsay statement relevant.

In Carter, *supra*, the co-defendant's intent was relevant to elements of the crime, i.e., the existence of a conspiracy and an overt act. Moreover, the statement in Carter would not even be considered hearsay after the adoption of the Indiana Rule of Evidence 801, but rather would be a statement in furtherance of a conspiracy.

(a) The Hillmon doctrine

The Hillmon doctrine is controversial in that it often involves the highly prejudicial situation where a victim made a statement of intent to meet the defendant that is used to prove the defendant met and killed the victim. See Mutual Life Ins. Co. v. Hillmon, 12 S. Ct. 909 (1892).

Although the Court in Carter v. State, 501 N.E.2d 439 (Ind. 1986) *cited* to Hillmon, the Court did not explicitly adopt the Hillmon doctrine allowing the intent of one actor to prove the actions of another. In fact, the commentary to Indiana Rule of Evidence 803(3) warns against the teaching of the Hillmon doctrine. "Whether statements of intent by one person should be admissible to prove that another person did an act has always been controversial. The usual context is a statement by a crime victim that the victim is going out to meet the defendant, offered to prove that the victim in fact met the defendant. The committee fails to see the connection, because the victim has no control over what the defendant does, and therefore the victim's intent cannot influence the defendant." Committee, Indiana Rule of Evidence 803(3).

Some jurisdictions have refused to adopt the Hillmon doctrine and limit the use of a victim's intent to act to proving only that the victim did act. Clark v. U.S., 412 A.2d 21, 29 (D.C. Ct. App. 1980) (following Federal Rule 803(3) House Report suggestion limiting the doctrine to prove only declarant's act).

(b) Belief as to acts in the past

Indiana Rule of Evidence 803(3) specifically excludes from the exception "a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will." Ind. R. Evid. 803(3).

> Camm v. State, 908 N.E.2d 215 (Ind. 2009) (testimony of victim's friend that victim said she expected Defendant to arrive home between 7:00 p.m. and 7:30 p.m., where undisputed evidence established that murders occurred at 7:30 p.m., was inadmissible to prove the conduct of a third party, in this case, the Defendant. Conviction reversed.)

McGrew v. State, 673 N.E.2d 787 (Ind. Ct. App. 1986) (victim's statement to friends after alleged rape that the defendant had hurt her by pulling her hair and forced her to perform oral sex was the very type of evidence that the above final phrase in 803(3) was meant to exclude), *sum. aff'd*, 682 N.E.2d 1289.

(3) Explanation of physical injuries

(a) Content of statement limited to pain

Although Ind. Evidence Rule 803(3) permits evidence of declarant's then existing physical condition, it does not allow declarant to offer statement concerning past events remembered or believed by declarant. Simmons v. State, 746 N.E.2d 81 (Ind. Ct. App. 2001).

Simmons v. State, 746 N.E.2d 81 (Ind. Ct. App. 2001) (in child molesting prosecution, complaining witness's stepmother was permitted to testify to declarant's reference to any physical pain she was experiencing in her vaginal area; however, she should not have been allowed to testify that complaining witness stated that the defendant caused her the pain).

Statements regarding the locality of existing pain or symptoms of his existing illness may be included as part of a statement of a then-existing bodily condition. Fleener v. State, 648 N.E.2d 652, 655 (Ind. Ct. App.1995), *aff'd,* 656 N.E.2d 1140, 1142 (Ind.1995).

Fleener v. State, 648 N.E.2d 652, 655 (Ind. Ct. App.1995) (hearsay statement that declarant "always complained that her bottom was sore" admissible under Rule 803(3)), *aff'd,* 656 N.E.2d 1140, 1142 (Ind.1995)).

(b) Timing: statement must be made contemporaneously with pain or condition

Abendroth v. Fidelity & Deposit Co.*,* 73 Ind. App. 50, 124 N.E. 714 (1919). ("I fell" and "I hurt myself," were merely narrative of past facts, and not admissible.)

McGrew v. State, 673 N.E.2d 787, 795, n.6 (Ind. Ct. App. 1996) (victim's statement that defendant had pulled her hair recounted painful experience in past and was not description of pain she was presently experiencing; thus, not within Rule 803(3) hearsay exception), *aff'd,* 682 N.E.2d 1289 (Ind. 1997).

Wolfe v. State, 512 N.E.2d 185 (Ind. 1987) (videotape of child victim was admissible to show his current physical and mental condition).

(c) Context of statement

Guilfoil Contracting Co. v. Clark, 52 Ind. App. 646, 99 N.E. 777 (1912) (witness had asked decedent how she felt and where she hurt; decedent's answer

admissible; declarations of present pain or bodily condition may be admissible when made in response to a question).

Cleveland, C.C. & L. Ry. v. Newell, 3 N.E. 836 (Ind.1885) (the statement may be made to anyone, and not necessarily to medical personnel).

c. Defendant's state of mind

(1) Hearsay statement of victim cannot generally prove defendant's intent

Statement of a victim is not probative of the defendant's intent.

Camm v. State, 908 N.E.2d 215 (Ind. 2009) (testimony of victim's friend that victim said she expected Defendant to arrive home between 7:00 p.m. and 7:30 p.m., where undisputed evidence established that murders occurred at 7:30 p.m., was inadmissible to prove the conduct of a third party, in this case, the Defendant. Conviction reversed.)

McGrew v. State, 673 N.E.2d 787 (Ind. Ct. App. 1986) (trial court erroneously admitted testimony by victim's friends regarding statements made by victim shortly after crime of rape; State failed to show any legal relevance, as victim's state of mind was not probative as to whether defendant acted knowingly or intentionally), *sum. aff'd*, 682 N.E.2d 1289.

Even if statements made in front of a defendant were relevant to the defendant's intent, the defendant's intent is not always a contested issue. See, e.g., Wickizer v. State, 626 N.E.2d 795 (Ind. 1993) (prior acts to prove intent are not admissible unless defendant places intent into issue).

(2) Self-defense

The only statutory elements of self-defense to which the defendant's state of mind might be relevant is to whether he is being subjected to imminent unlawful force and has reasonable belief that force is necessary to prevent serious injury to himself. Gillespie v. State, 832 N.E.2d 1112 (Ind. Ct. App. 2005).

Brand v. State, 766 N.E.2d 772 (Ind. 2002) (hearsay statements, along with victim's character, should have been admitted into evidence to show that defendant had reason to fear the victim in self-defense case).

Shepard v. State, 451 N.E.2d 1118 (Ind. Ct. App. 1983) (trial court erred in refusing to permit the defendant to introduce evidence of threats communicated to him by the West family; threats were not offered for the truth of the matter asserted, but only to explain the defendant's state of mind as it related to his claim of self-defense; thus, evidence was not inadmissible hearsay).

4. Statements for purposes of medical diagnosis or treatment - Rule 803(4)

"A statement that: (A) is made by a person seeking medical diagnosis or treatment; (B) is made for - and is reasonably pertinent to - medical diagnosis and treatment; and (C) describes medical history; past or present symptoms, pain or sensations; their inception; or their general cause." Ind. R. Evid. 803(4).

Hearsay statements made for purposes of medical diagnosis or treatment may be admissible under this exception, and may also be admissible indirectly under IRE 703, Bases of Opinion Testimony by Experts, or on cross-examination under IRE 705, Disclosure of Facts or Data Underlying Expert Opinion.

Statements for purpose of medical diagnosis and treatment have been identified as the sort of non-testimonial statement that does not give rise to Confrontation Clause protection. Michigan v. Bryant, 562 U.S. 344, 362 n. 9, 131 S. Ct. 1143, 1157 n.9 (2011).

a. Rationale

This exception is based upon the belief that a declarant's self-interest in seeking medical treatment makes it unlikely that the declarant will mislead the person he wants to treat him. McClain v. State, 675 N.E.2d 329, 331 (Ind.1996).

b. Two-step analysis for admission

(1) Is the declarant motivated to provide truthful information in order to promote diagnosis and treatment?

(2) Is the content of the statement such that an expert in the field would reasonably rely on it in rendering diagnosis or treatment?

McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996).

(1) Declarant must be motivated by diagnosis and treatment

Where a patient consults with a physician, the declarant's desire to seek and receive treatment may be inferred from the circumstances. Where that inference is not obvious, as in the case of a young child brought to treatment by someone else, there must be evidence that the declarant understood the professional's role. McClain v. State, 675 N.E.2d 329,331 (Ind. 1996) (*citing* Miller, 13 *Indiana Evidence,* 625 § 803.104 (2d ed.)). How the injury occurred, how old the injury is and the length of time it occurred are all relevant and go towards medical assessment. Ramsey v. State, 122 N.E.3d 1023 (Ind. Ct. App. 2019).

McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996) (no evidence in record that the child victim understood that he was speaking to a trained professional for the purposes of obtaining diagnosis of, or providing treatment for, emotional or psychological injuries; thus, statement of child to therapist was inadmissible).

VanPatten v. State, 986 N.E.2d 255 (Ind. 2013) (nurse's statements erroneously admitted under medical diagnosis/treatment hearsay exception where there was no testimony to establish that six-year-old girls understood the nurse's professional role, knew what telling the truth meant or that they knew that they were being interviewed for the purpose of medical diagnosis; without that firm indication of reliability in the record, court cannot infer that children were motivated to speak truthfully to nurse); Cf. Walters v. State, 68 N.E.3d 1097 (Ind. Ct. App. 2017).

Cooper v. State, 714 N.E.2d 689 (Ind. Ct. App. 1999) (where nurse's testimony as to conversation she had with child victim made clear that child knew she was in emergency room for exam by doctor because of alleged molestation and child understood professional roles of the nurse and the doctor, statements made by child to nurse were admissible under statements pertinent to medical diagnosis or treatment exception to hearsay); see also Steele v. State, 42 N.E.3d 138 (Ind. Ct. App. 2015).

Burton v. State, 23 N.E.3d 49 (Ind. Ct. App. 2014) (nurse's testimony about what child molesting victim told her during examination was admissible under Evid. R. 803(4) because the testimony provided adequate foundation to show that child was motivated to tell the truth); see also Matter of A.F., 69 N.E.3d 932 (Ind. Ct. App. 2017).

(2) Expert must reasonably rely on statement for purpose of diagnosis or treatment

Statements attributing fault are excluded because they are not pertinent to or further the patient's treatment or diagnosis. U.S. v. Pollard, 790 F.2d 1309 (7th Cir. 1986), *overruled on other grounds* U.S. v. Sblendorio, 830 F.2d 1382 (7th Cir. 1987).

Statement of defendant's age, made by a social worker and recorded in a battery victim's medical records, is generally not within the Ind. Evid R. 803(4) exception. But age may, in some cases, be pertinent to a medical diagnosis or treatment. See Clark v. State, 985 N.E.2d 1095 (Ind. Ct. App. 2013).

U.S. v. Pollard, 790 F.2d 1309 (7th Cir. 1986) (statements in medical records frequently relate both to the cause of a medical condition and fault; the trial court can redact the statement so as to render it admissible, rather than let an inadmissible portion of the statement taint the whole and refuse to admit the entire statement), *overruled on other grounds* U.S. v. Sblendorio, 830 F.2d 1382 (7th Cir. 1987)).

But see Weis v. State, 825 N.E.2d 896 (Ind. Ct. App. 2005) (medical records with margin notes made by nurse who did not testify that said, "Molested by stepdad [D]. [H]as been happening off - on since pt was 3 yrs old. [L]ast occurrence was in March..." were admissible; notes did not constitute hearsay because they were introduced to explain why the doctor conducted his physical examination, not for the truth of the statement).

PRACTICE POINTER: In Weis, *supra*, the court did not address whether the identity of the defendant was necessary to explain the treatment. Thus, this objection is still a valid one. Further, even where statement attributing identity to the defendant is admitted under 803(4), the statement, alone, is insufficient proof of the defendant's identity. Vest v. State, 621 N.E.2d 1094 (Ind. 1993) (Ind. R. Evid. 803(4) did not appear to alter previous case law precluding use of statement for substantive purpose of proving identity).

(a) Child sexual abuse and domestic violence

Statements identifying the perpetrator may be admissible under Rule 803(4) in cases where injury occurs as the result of sexual abuse or domestic violence, which may alter the course of diagnosis and treatment. Nash v. State, 754 N.E.2d 1021 (Ind. Ct. App. 2001).

Nash v. State, 754 N.E.2d 1021 (Ind. Ct. App. 2001) (statement of identity of domestic sexual abuser was reasonably pertinent to effort of emergency room staff in treating victim to identifying underlying cause of sexual abuse and in seeking to prevent further domestic abuse).

Dowell v. State, (Ind. Ct. App. 2007) (although statements of sexual assault victim to ER nurse concerning nature of attack and identity of defendant were admissible, statement that regarding her intent to prosecute was not related to treatment and inadmissible).

Chambless v. State, 119 N.E.3d 182 (Ind. Ct. App. 2019) (victim's identification of her live-in boyfriend as her attacker was relevant to medic's diagnosis and treatment of her).

Baxter v. State, 132 N.E.3d 1 (Ind. Ct. App. 2019) (medical report containing statement that defendant was the perpetrator of alleged sexual assault of four-year-old complaining witness was properly admitted over hearsay objection).

Thomas v. State, 656 N.E.2d 819 (Ind. Ct. App. 1995) (victim's statements to physician re: cause of bite mark wounds were made for purpose of diagnosing and treating her injuries due to the doctor's testimony concerning the necessity of knowing whether the bite marks are human).

But see Commonwealth v. Smith, 681 A.2d 1288 (Pa. 1996) (identity of perpetrator pertinent to child's treatment is not necessary for treatment for burns; dissenting justices argued that child abuse differs from other injuries, and so does its treatment).

PRACTICE POINTER: In cases where the patient's statement concerning a battery to the doctor is the only statement made by the patient to anyone concerning the battery, the statement is protected by the patient-physician privilege. Thomas v. State, 656 N.E.2d 819 (Ind. Ct. App. 1995). However, if the patient also makes a police report disclosing similar facts, then the patient has waived the privilege. Id.

(b) Emotional healing: statements made in therapy

In cases where there is a proper showing of reliability, statements made to a family therapist may be admissible. McClain v. State, 675 N.E.2d 329,331 (Ind. 1996) (*citing* United States v. Newman, 965 F.2d 206, 210 (7th Cir. 1992), *cert. den.* 506 U.S. 976, 113 S. Ct. 470 (1992) (psychology is "medicine" for purpose of Fed. R. Evid. 803(4)).

United States v. White, 11 F.3d 1446, 1449-50 (8th Cir. 1993) (statement by child abuse victim to social worker could have been admissible, but no showing made that victim believed the interview in automobile was made for purposes of emotional treatment.)

McClain v. State, 675 N.E.2d 329, 331 (Ind. 1996) (no evidence in record that the victim understood that he was speaking to a trained professional for purposes of obtaining diagnosis of, or providing treatment for, emotional or psychological injuries; thus, statement of child to therapist was inadmissible).

Fleener v. State, 648 N.E.2d 652 (Ind. Ct. App. 1995) (child-victim's statements that she could not get thoughts of molest out of her mind made to psychologist were reasonably pertinent to diagnosis or treatment under hearsay exception found in Ind. Evid. Rule 803(4)), *sum. aff'd*, 656 N.E.2d 1140.

But see Commonwealth v. Smith, 681 A.2d 1288 (Pa. 1996) (consideration of statement's value to child's emotional recovery would so extend exception as to destroy it; dissenting justices argued that child abuse differs from other injuries, and so does its treatment).

c. Statements made to nonmedical personnel

Statements made to non-physicians may fall within the exception if the statement is made to promote diagnosis or treatment. Statements made to hospital attendants, ambulance drivers, family therapists, or even family members might be included. McClain v. State, 675 N.E.2d 329, 331 (Ind.1996); see also Fleener v. State, 648 N.E.2d 652 (Ind. Ct. App. 1995), *aff'd,* 656 N.E.2d 1140, 1142 (Ind.1995).

Mastin v. State, 966 N.E.2d 197 (Ind. Ct. App. 2012), *transfer denied* (statements made by a child to her grandmother on the way home from medical examination and without a medical professional present were not made for purposes of diagnosis or treatment).

d. Non-patient declarants

A statement made by someone other than the patient may be admissible under the Rule if the trial court finds that the statement was made for the purposes of medical diagnosis or treatment. Statements by bystanders, family members, and others, made for purposes of treating an injured person and pertinent to that treatment, may be admissible under the rule. Lovejoy v. United States, 92 F.3d 628 (8th Cir. 1996).

United States v. Yazzie, 59 F.3d 807 (9th Cir. 1995) (statements given by child victim's mother in child sexual abuse case.)

5. Recorded recollection - Rule 803(5)

"A record that: (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and (C) accurately reflects the witness's knowledge. If admitted, the record may be received as an exhibit only if offered by an adverse party." Ind. R. Evid. 803(5).

a. Relation to Rule 612

Rule 803(5) deals with "recorded recollection," where the witness is unable to testify from memory and the document itself is used as evidence. Under the "recorded recollection" exception, the witness has insufficient memory from which to testify on a particular event, and the contents of the memorandum or record itself provides substantive evidence on that event. Rule 612 deals with discovery and use of documents that aided in successfully refreshing memory.

The following is a three-tiered approach to determine the use of recorded recollections: (1) the unaided testimony of a witness is preferred; (2) if the unaided testimony is not available, the law prefers refreshed recollection; and (3) if the witness's recollection cannot be revived, the recorded recollection exception to hearsay Rule 803(5) may be available to admit the document which contains the witness's prior knowledge of the facts in question. Marcum v. State, 772 N.E.2d 998, 1002 (Ind. Ct. App. 2002) (*quoting* Smith v. State, 719 N.E.2d 1289, 1290-91 (Ind. Ct. App. 1999). Unless the document fails to refresh recollection, it may not be read into evidence as a substitute for direct testimony of a witness. Blinn v. State, 487 N.E.2d 462 (Ind. Ct. App. 1986).

b. Confrontation Clause

If the past recollection was testimonial, meaning it was prepared in anticipation of litigation, and is offered by the government in a criminal case, the defendant must have the opportunity to cross-examine the declarant, at or before trial, or the statement or the admission of the hearsay would violate the 6th Amendment Confrontation Clause. See Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

Williams v. State, 698 N.E.2d 848, 851-52 (Ind. Ct. App. 1998) (prior to Crawford, *supra*, court held that "although we acknowledge that [the declarant] stated he was unable to remember what he previously said, Williams still had the opportunity to impeach [the declarant] to allow the jury to judge [the declarant's] demeanor and credibility in answering questions"; no denial of Sixth Amendment or Indiana Constitutional rights to confront).

Although a prior statement of which the witness does not remember the content can be used as a recorded recollection, a prior statement that a witness does not even remember making cannot be used as a recorded recollection because the opposing party does not

have an opportunity to cross on the statement. Because a witness who does not have memory of having a conversation cannot be crossed, a prior statement may not be used as substantive evidence if the declarant (1) denies making the statement or (2) denies memory of making the statement. See, e.g., Brown v. State, 671 N.E.2d 401, 406-07 (Ind. 1996).

A defendant's right to confront and cross-examine does not guarantee the quality of the cross-examination about a prior statement. Hutcherson v. State, 966 N.E.2d 766 (Ind. Ct. App. 2012), *transfer denied* (witness denied memory of the night of the incident, but eventually testified he could remember about half of his prior statement; not a violation of the Confrontation Clause to permit jury to hear prior statement).

c. Foundation

(1) Lack of memory of subject matter

Indiana law prior to adoption of Rules of Evidence in 1994 required that witness be shown to have no present knowledge of pertinent information before recorded recollection exception could be used. However, under the new rule, witness need not be shown to be completely without present memory but need only be shown to have insufficient recollection to enable witness to testify fully and accurately. Horton v. State, 936 N.E.2d 1277, 1283 (Ind. Ct. App. 2010), *sum. aff'd*, 949 N.E.2d 346 (Ind. 2011); Smith v. State, 719 N.E.2d 1289 (Ind. Ct. App. 1999). Whether the witness lacks sufficient recall is a question for the trial judge under Rule 104(a).

Marcum v. State, 772 N.E.2d 998 (Ind. Ct. App. 2002) (declarant's hearsay statement was inadmissible, as it was not offered to refresh her memory of events being the witness remembered the events, but rather to contradict her testimony).

Gorby v. State, 152 N.E.3d 649, 652–53 (Ind. Ct. App. 2020) (witness might have said she didn't want to talk about events but also said she couldn't remember events; no error in trial court crediting testimony that she couldn't remember, and video of interview fell under the "recorded recollection" hearsay exception).

Garth v. State, 182 N.E.3d 905 (Ind. Ct. App. 2022) (letter from boyfriend to incarcerated defendant not admissible as recorded recollection where her express intent in seeking to admit the letter was to contradict her boyfriend's previous testimony regarding his motive for killing the victim; there was no testimony indicating that the boyfriend could not recall his motive).

Smith v. State, 719 N.E.2d 1289 (Ind. Ct. App. 1999) (guard's statement that he could not remember some events which happened seven years ago was enough for the trial court to find that his memory could not be sufficiently refreshed to testify fully and accurately; thus, the State was properly allowed to admit under recorded recollection exception report which the guard wrote shortly after incident).

If the witness has no memory of making the statement, then the statement does not fall within the recorded recollection exception and cannot be read into evidence.

Kubsch v. State, 866 N.E.2d 726 (Ind. 2007), *writ of habeas corpus granted*, Kubsch v. Neal, 838 F.3d 845 (7th Cir. 2016) (Indiana Supreme Court's conclusion that due process clause did not require admission of critical evidence into Kubsch's trial was either contrary to, or an unreasonable application of, Supreme Court precedent).

Where the witness is illiterate and cannot read the statement, best practice is to lay a foundation for the prior statement by reading it to the witness outside the presence of the jury. Hutcherson v. State, 966 N.E.2d 766 (Ind. Ct. App. 2012), *transfer denied* (prosecutor reading the statement aloud to the witness with the jury present did not prejudice the defendant where the statement was cumulative of other evidence).

It has been suggested that an adequate showing of insufficient memory is made if the memorandum does not refresh the witness's recollection. Miller, 13 *Indiana Evidence*, 382-83 § 803.105 (4th ed.). Whether the witness lacks sufficient recall is a question for the trial judge under Rule 104(a).

Impson v. State, 721 N.E.2d 1275, 1283 (Ind. Ct. App. 2000) (insufficient memory can be found when an apparently reluctant witness claims lack of memory to evade a question).

(2) Personal knowledge of event recorded

A witness must have personal knowledge of the event that she contemporaneously recorded or adopted, if recorded by another, while she retained a clear memory. Flynn v. State, 702 N.E.2d 741, 744 (Ind. Ct. App. 1998). Whether the witness once had knowledge about the matter should be measured by the standard of personal knowledge established by Rule 602. Miller, 13 *Indiana Evidence,* 382 § 803.105 (4th ed.).

(3) Timeliness of memorandum or record

The memorandum or record need not have been made immediately after the event but must have been made when the witness had the matter fresh in mind. United States v. Lewis, 954 F.2d 1386 (7th Cir. 1992).

United States v. Lewis, 954 F.2d 1386 (7th Cir. 1992) (no abuse of discretion in admitting recorded statement given by an inmate to FBI agent; although a six-month delay between events referred to and statement was significant, it was not so long that the declarant could not have accurately recalled events; Rule 803(5) does not have specific time constraints).

Garth v. State, 182 N.E.3d 905 (Ind. Ct. App. 2022) (no abuse of discretion in excluding letter to defendant from co-defendant under recorded recollection exception, where letter was written weeks or months after murder, and therefore was not "made or adopted by the witness when the matter was fresh in the witness's memory").

(4) Statement must have been made or adopted by declarant

A witness must be able to vouch for the accuracy of the prior statement. Kubsch v. State, 866 N.E.2d 726 (Ind. 2007), *writ of habeas corpus granted*, Kubsch v. Neal, 838 F.3d 845 (7th Cir. 2016).

Kubsch v. State, 866 N.E.2d 726 (Ind. 2007), *writ of habeas corpus granted*, Kubsch v. Neal, 838 F.3d 845 (7th Cir. 2016) (where the witness had no memory of being interviewed by the police, the witness could not vouch for the statement and the interview could not be read into evidence as a recorded recollection).

Poore v. State, 501 N.E.2d 1058 (Ind. 1986) (trial court erred in sustaining State's objection that memorandum must be made by testifying witness in order to be admissible as a recorded recollection, and thus, should have allowed defendant to read prior interview of witness; memorandum used to refresh recollection must be written by witness or another at or near time of occurrence; held, conviction reversed).

Ballard v. State, 877 N.E.2d 860 (Ind. Ct. App. 2007) (where witness refused to vouch for the accuracy of her prior statement by claiming that probably a lot of things said to the detective in the prior statement were not true and her memory is impaired due to her daily gin drinking, the statement was inadmissible).

Pelissier v. State, 122 N.E.3d 983 (Ind. Ct. App. 2019) (unlike the testimony of the victim in Ballard (above), the witness here never indicated what he said regarding shooting incident was not true and part of his statement indicated he was telling the truth).

U.S. v. Schoenborn, 4 F.3d 1424 (7th Cir. 1993) (where the witness differs with the recorder regarding whether recorder's transcription of witness's statement is correct, Rule 803(5)'s requirement that report be made or adopted by witness has not been satisfied).

United States v. Porter, 986 F.2d 1014 (6th Cir.1993), *cert. den.*, 114 S. Ct. 347 (1993) (adoption found where, in part, the witness admitted making statement, had made statement under penalty of perjury, had signed statement on every page, and had changed and initialed wording of statement several times).

United States v. Collicot, 92 F.3d 973, 984 (9th Cir.1996) (recorded recollection requirements are not satisfied where there is no evidence that the witness either adopted report as her own or vouched for its accuracy).

d. Examples

(1) Probable cause affidavits

Baran v. State, 639 N.E.2d 642 (Ind. 1994) (trial court properly admitted officer's probable cause affidavit under past recollection recorded exception to the hearsay rule; however, DeBruler, J., did not agree that the affidavit was admissible due to the

risk that officers have every reason to be selective or to exaggerate in affidavit because purpose of document is to persuade judicial officer that arrest was justified).

(2) Grand jury testimony

State v. Sua, 987 P.2d 959 (Haw. 1999) (grand jury testimony is sufficiently reliable to be admitted as recorded recollection).

(3) Statements to police

Hurt v. State, 151 N.E.3d 809 (Ind. Ct. App. 2020) (erroneous admission of C.W.'s statement where at trial she did not vouch for the accuracy of her statement to police, she was heavily intoxicated when she gave the statement and could not recall speaking to the officer).

Williams v. State, 698 N.E.2d 848 (Ind. Ct. App. 1998) (defendant conceded the videotape was admissible as recorded recollection). See also United States v. Lewis, 954 F.2d 1386, 1395 (7th Cir. 1992).

United States v. Sollars, 979 F.2d 1294, 1298 (8th Cir. 1992), *cert. den.* (witness's statement was admissible under recorded recollection hearsay exception after she testified that she remembered talking to a BATF agent but that she could not remember what she told him).

(4) Videotaped Interviews

Horton v. State, 936 N.E.2d 1277 (Ind. Ct. App. 2010), *sum. aff'd*, 949 N.E.2d 346, 347 n.2 (videotaped interview of victim of child molesting was admissible under Evidence Rule 803(5) because recording related to act of molestation, victim had insufficient recollection at trial to testify fully and accurately, victim was shown to have made or adopted recording when incident was still fresh her in memory and recording reflected victim's knowledge correctly).

Robey v. State, 168 N.E.3d 288 (Ind. Ct. App. 2021) (harmless error to play video recording of forensic interview as recorded recollection where C.W. was able to testify fully and accurately about the essential elements of the crime).

e. Not to be entered as exhibit

Rule 803(5) permits the recorded recollection to be read into evidence but not received as an exhibit unless offered by an adverse party.

Flynn v. State, 702 N.E.2d 741 (Ind. Ct. App. 1998) (the State should not have been allowed to admit into evidence audio tape and transcript of its own witness' taped statement, even though they could read them into evidence under Evid. R. 803(5); harmless error).

PRACTICE POINTER: Although the document may not be admitted into evidence under 803(5), the admission of the document may fall under another evidence rule. See, e.g., Clark v. State, 808 N.E.2d 1183 (Ind. 2004) (witness statement from police interview was not properly admitted as an exhibit pursuant to Rule 803(5); however, statement was admissible under Rule 801(d)(1)(A) as substantive evidence as prior inconsistent statement made under oath).

6. Records of regularly conducted business activity - Rule 803(6)

Rule 806(6) establishes a slightly modified version of the former "business records" exception to the hearsay rule. It applies to (a) memorandum, report, record, or data compilation, in any form, (b) of acts, events, conditions, opinions, or diagnoses, (c) made at or near the time (d) by, or from information transmitted by, a person with knowledge, (e) kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit(f) the regular practice of which was to make the memorandum, report, record, or data complication, (g) all as shown by testimony or affidavit of a qualified witness who need not be the records' custodian. Indiana Rule of Evidence 803(6). Even if each of these requirements is satisfied, the record still can be excluded if the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness.

a. Rationale

"The reliability of business records stems from the fact that they are subject to review, audit, or internal checks, from the precision engendered by the repetition, and from the fact that the person furnishing the information has a duty to do it correctly. None of these is present in the case of a report that simply accepts information from a source that is not itself acting in the course of a regular activity." Stahl v. State, 686 N.E.2d 89, 92 (Ind.1997).

Holmes v. State, 671 N.E.2d 841, 859 (Ind. 1996) (a handwritten note from deceased night shift manager/supervisor to morning shift manager satisfied indicia of reliability because the statement and the circumstances under which it was made rendered the declarant night shift manager particularly worthy of belief), *cert. den.,* 139 L.Ed.2d 85, 118 S. Ct. 137.

b. Examples

The following documents have been held to be admissible under the business activity exception: arrest records and arrest reports, including fingerprint cards, ATM photos and audit sheets, autopsy reports, blood alcohol test results, blood and DNA test results, certifications of mailing, check vouchers and deposit slips, commitment orders, financial statements, insurance policies, inventory records, job logs tracking performance, log sheets of police evidence, marriage licenses, medical reports, motel reservations entries, motor vehicle registrations and driving records, pawn tickets, police technician's reports on blood type, conduct records, records of telephone calls, school attendance records, security agreements, time cards, and working papers of audits. See In re Termination of the Parent-Child Relationship of E.T., 808 N.E.2d 639, 645 n.4 (Ind. 2004).

National Precursor Log Exchange records of defendant's purchases and attempted purchases of pseudoephedrine and ephedrine were within the business records exception to the hearsay rule. Embrey v. State, 989 N.E.2d 1260(Ind. Ct. App. 2013).

Chain of custody report that records location of evidence. Vaughn v. State, 13 N.E.3d 873 (Ind. Ct. App. 2014).

c. Foundation

Indiana does not allow business records foundation to be based upon circumstantial evidence derived from documents themselves, nor does Indiana allow the trial court's discretion to consider inherent trustworthiness of an entry and nature of business which produced it. Cardin v. State, 540 N.E.2d 51 (Ind. Ct. App. 1989).

(1) Document must be recorded by, or from information transmitted by, a person with knowledge

Prior to the adoption of the Rules of Evidence, there was a rebuttable presumption that the affiant who prepared the challenged documents has personal knowledge. There is nothing inconsistent with this presumption in Indiana Rule of Evidence 803(6). Thus, the absent rebuttal evidence to the contrary, it may be presumed that person who prepared documents had personal knowledge. Ground v. State, 702 N.E.2d 728 (Ind. Ct. App. 1998).

Serrano v. State, 808 N.E.2d 724 (Ind. Ct. App. 2004) (trial court erred in admitting arrest report to prove defendant's age for a Sexual Misconduct with a Minor conviction; because the State called records keeper rather than reporting officer to testify, nothing suggested that reporting officer had personal knowledge of the information contained therein and circumstances suggested a lack of trustworthiness), *overruled on other grounds,* 823 N.E.2d 1187.

Jennings v. State, 723 N.E.2d 970 (Ind. Ct. App. 2000) (where arrestee's age comes from arrestee himself and is checked against computer records, jailer had personal knowledge of information and inmate profile report as a business record and was admissible to prove the defendant's age).

"The sponsor of an exhibit need not have personally made it, filed it, or have firsthand knowledge of the transaction represented by it. The sponsor need only show that the exhibit was part of certain records kept in the routine course of business and placed in the records by one who was authorized to do so, and who had personal knowledge of the transaction represented at the time of entry." Stahl v. State, 686 N.E.2d 89, 92 n. 2 (Ind. 1997) (*quoting* Boarman v. State, 509 N.E.2d 177, 181 (Ind. 1987)).

King v. State, 908 N.E.2d 673 (Ind. Ct. App. 2009), *trans. granted and sum. aff'd on hearsay issue*, 921 N.E.2d 1288 (Ind. 2010) (where Yahoo! failed to verify accuracy of the source of information in its user profile and login tracker for the account from which an undercover agent posing as a fifteen-year-old girl was solicited, the source of information of the method or circumstances of preparation

of the user profile and login tracker indicated a lack of trustworthiness and were inadmissible; nonetheless, error was harmless).

Speybroeck v. State, 875 N.E.2d 813 (Ind. Ct. App. 2007) (record keeper from bank did not have personal knowledge of letters and records from another business which were sent to the bank during their investigation and thus could not attest that the business records were made in the course of regular business).

Hatton v. State, 498 N.E.2d 398 (Ind. Ct. App. 1989) (the State failed to lay proper foundation for computer printout sheet listing Medicaid monies paid to the defendant, charged with welfare fraud; witness had no personal knowledge of computer system and did not know how/when information was entered into computer (located in a different city)).

J.L. v. State, 789 N.E.2d 961 (Ind. Ct. App. 2003) (attendance officer for IPS who had personal knowledge of the school's record-keeping process was proper person to lay foundation for juvenile's school attendance records, although officer did not work at actual middle school that juvenile attended).

(2) Person with personal knowledge must be acting in regular course of business

The person who recorded the information in the regular course of business must have had personal knowledge of the information recorded in order to make it reliable. Stahl v. State, 686 N.E.2d 89 (Ind. 1997). The essential link of participation in a regularly conducted activity is sometimes broken because the person who supplied the data was not acting within the course of a regular business. Often, the person is a 'volunteer,' offering information to persons conducting an inquiry or investigation. Thus, the person to whom the information is offered then cannot qualify as the initial person in the chain because he or she does not have personal knowledge of the underlying event. Stahl v. State, 686 N.E.2d 89, n.3 (Ind.1997) (*citing* 5 *Weinstein's Federal Evidence,* Sec. 803.11[4] (2d ed. 1997)).

Stahl v. State, 686 N.E.2d 89 (Ind.1997) (affidavit from account owner that he did not withdraw funds, authorized or benefit from their withdrawal was not admissible under business record exception because the recorder of the affidavit, the only person who was acting in the regular course of business, did not have personal knowledge of the facts within the affidavit).

(3) The person recording the record must be acting in the regular course of business

Indiana Evidence Rule 803(6) unequivocally requires the proponent of business records to establish, by testimony of a qualified witness, that records are regularly made. Without proof that records are regularly made, the proponent of business records has not laid the proper foundation for the records under the plain meaning of Rule 803(6), and they are inadmissible under the hearsay rule. Ground v. State, 702 N.E.2d 728, 731-32 (Ind. Ct. App. 1998).

Although a sponsor need not be the custodian or creator of a proffered record, a sponsor must still testify about how the record was made, who filed it, and that the

person who filed it was both authorized to do so and had personal knowledge of the transaction. Embry v. State, 989 N.E.2d 1260 (Ind. Ct. App. 2013).

Sandleben v. State, 22 N.E.3d 782 (Ind. Ct. App. 2014) (State's witness, who was manager of field operations for State Police, could not provide an adequate foundation to sponsor internet service provider's subscriber information records because he was not the custodian and did not have knowledge of the record sufficient to sponsor it; witness did not explain how the record was created or who created it, much less that an authorized person with personal knowledge of the underlying transaction had created and filed it; thus, State failed to lay an adequate foundation for records' admission under business records exception to hearsay rule).

Ground v. State, 702 N.E.2d 728 (Ind. Ct. App. 1998) (because the State failed to present any testimony that the defendant's bank records were regularly made in the course of business, the records were inadmissible; reversible error).

Holmes v. State, 671 N.E.2d 841 (Ind. 1996) (trial court did not err in admitting handwritten message penned by victim as night shift manager of restaurant; State provided proof that this exhibit was handwritten original, made by shift supervisor as part of her routine duties to inform next shift supervisor of relevant events occurring under her supervision).

(4) There must be a duty to record and maintain records by both the recorder and the record keeper

The person who recorded the information, and the person with personal knowledge, must both have been under a duty to observe and report the facts. Stahl v. State, 686 N.E.2d 89 (Ind.1997). Records kept in the ordinary course of business are presumed to have been placed there by those who have a duty to so record and have personal knowledge of the transaction represented by the entry unless there is a showing to the contrary. Rolland v. State, 851 N.E.2d 1042, 1045 (Ind. Ct. App. 2006).

Collins v. State, 567 N.E.2d 798 (Ind. 1991) (Bureau of Motor Vehicles has duty to record mailing of notice of suspension, and therefore certification of such notice is admissible as within official records exception to hearsay rule).

Cardin v. State, 540 N.E.2d 51 (Ind. Ct. App. 1989) (state failed to lay proper foundation for admissibility of checks because no one testified that the stamps were part of regularly conducted business and created by someone with a duty to make the stamps; markings on front and back of checks offered to prove that checks had been processed by bank were hearsay).

Non-routine records, even if made in the course of regularly conducted activity, are probably not within the scope of the exception in any event. See Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477 (1943) (railroad took statement from the locomotive engineer after a crossing accident; when the engineer died before trial, the railroad offered the statement under the common law 'regular course of business' exception. The Court held that the report was not within the exception; although the railroad

routinely collected accident reports, they were "calculated for use essentially in the court, not in the business."); 2 *McCormick on Evidence* §288, 439-41 (7th ed.).

But see Houston v. State, 957 N.E.2d 654 (Ind. Ct. App. 2011) (in prosecution for failure to assure a child's attendance at school, an affidavit from school attendance officer, which was on blank forms prepared by the prosecutor, alleging that parent/defendant was notified of the child's absences, was prepared, and filed under a statutory duty and therefore met the business records exception). Note that if Houston were generally followed, any document prepared under a statutory duty (including probable cause affidavits) would be admissible as substantive evidence over a hearsay objection.

(5) Record must be necessary to operation of business

Although records may be complied to prove a business or non-profit organization's goal, they are inadmissible if the records are not necessary to the operation of the business. In re Relationship of E.T., 808 N.E.2d 639, 644-45 (Ind. 2004).

In re Relationship of E.T., 808 N.E.2d 639 (Ind. 2004) (monthly reports made by staff regarding their first-hand observations at home and supervised visits between parents and children were prepared for the sole use of the agency and not necessary for the operation of the agency; thus, they were inadmissible as business records).

A.B. and J.R. v. DCS, 154 N.E.3d 818 (Ind. 2020) (laboratory depends on parent's drug test records to operate, thus the results were properly admitted at TPR hearing).

(6) Record of events must be made at or near time of events

Rolland v. State, 851 N.E.2d 1042 (Ind. Ct. App. 2006) (no error in admitting bank record printed long after relevant entry was made, even though employees had access to record to change or amend record after it was initially completed).

d. Exception- lack of trustworthiness

Documents which meet the foundational requirements of Rule 803(6) are admissible unless "the source of information or the method of circumstances of preparation indicate a lack of trustworthiness." Ind. R. Evid. 803(6).

Serrano v. State, 808 N.E.2d 724 (Ind. Ct. App. 2004) (although not part of the trial record, the pre-sentence report and pre-sentence investigation listed a date of birth that would have placed the defendant at age seventeen rather than eighteen, as indicated by records, when he had consensual sex; thus, document was inadmissible due to the lack of trustworthiness in the surrounding circumstances), *overruled on other grounds,* 823 N.E.2d 1187.

Speybroeck v. State, 875 N.E.2d 813 (Ind. Ct. App. 2007) (affidavit certifying documents from another company and documents which were dated after the

affidavit was executed lacked trustworthiness and the attached documents were thus inadmissible).

McGill v. State, 160 N.E.3d 239, 246 (Ind. Ct. App. 2020) (IQ assessment offered by defendant lacked indicia of trustworthiness where authentication affidavit did not identify a business entity or detail what routine business activity required psychologist to perform assessments; it also did not explain how the maintenance of psychological records is necessary for a business purpose).

A.B. and J.R. v. DCS, 154 N.E.3d 818 (Ind. 2020) (parent's drug test results were properly admitted into evidence under Rule 803(b) in a TPR case, as the laboratory depends on the records to operate and there was evidence presented to establish the records as sufficiently reliable).

e. Original or first permanent entries not required

Prior Indiana law required that the record be the original or first permanent entry. See, e.g., Wells v. State, 254 Ind. 608, 261 N.E.2d 865 (1970). However, Rule 803(6) contains no such requirement, and appears to allow any form. See 2 *McCormick on Evidence,* § 287, 434 (7th ed.) (federal rules).

Records admitted under this rule must still comply with Rules 1001 through 1008.

f. Statements within the business document must be admissible under other exceptions

(1) Hearsay within hearsay

The mere fact that the recording of third-party statements in a document might be routine, imports no guarantee of the truth, or even reliability of those statements. To construe these statements as admissible simply because the person making the document is under a business duty to record would be to open the flood gates for the introduction of random, irresponsible material beyond the reach of the usual tests for accuracy- cross-examination and impeachment of the declarant. In re Termination of the Parent-Child Relationship of E.T., 808 N.E.2d 639, 643-44 (Ind. 2004) (*quoting* Matter of Leon R.R., 397 N.E.2d 374 (N.Y. 1979)).

People v. Hernandez, 55 Cal. App. 225, 63 Cal. Rptr. 2d 769 (1997) (evidence obtained from searchable sex crime database, made up of information from detectives' reports, was not admissible under business records exception to hearsay rule; information in computer database was hearsay culled from detectives' reports; fact that hearsay was input daily into internal police computer database did not make it any more reliable than police reports themselves).

(2) Expertise of opinion giver

If opinions are included in the business reports, the expertise of the opinion-giver must be established. In re Termination of the Parent-Child Relationship of E.T., 808 N.E.2d 639, 644 (Ind. 2004).

In re Termination of the Parent-Child Relationship of E.T., 808 N.E.2d 639, 644 (Ind. 2004) (opinions of case workers regarding parent-child relationship included in reports were inadmissible without establishing qualification of case worker or having case worker testify).

(3) Medical records

Weis v. State, 825 N.E.2d 896 (Ind. Ct. App. 2005) (medical records with margin notes made by nurse who did not testify that said, "Molested by stepdad [D]. [H]as been happening off - on since pt was 3 yrs old. [L]ast occurrence was in March ...." were admissible; notes did not constitute hearsay because they were introduced to explain why the doctor conducted his physical examination, not for the truth of the statement).

But see Payne v. State, 515 N.E.2d 114 (Ind. Ct. App.1987) (while medical records are admissible as business records, any facts within a medical history given by the patient are not admissible as substantive evidence), *overruled on other grounds by* Cox v. State, 706 N.E.2d 547 (Ind.1999).

g. Confrontation Clause

Although under Crawford, *supra,* the use of testimonial hearsay against a criminal defendant who has not had the opportunity to cross-examine the declarant violates the Sixth Amendment Confrontation Clause, "[m]ost hearsay exceptions covered statements that by their nature were not testimonial-- for example, business records or statements in furtherance of a conspiracy." Crawford v. Washington, 541 U.S. 36, 56, 124 S. Ct. 1354, (2004); *accord*, Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324, 129 S. Ct. 2527, 2539-40 (2009); Richardson v. State, 856 N.E.2d 1222 (Ind. Ct. App. 2006).

Richardson v. State, 856 N.E.2d 1222 (Ind. Ct. App. 2006) (relying on a statement in Crawford, *supra*, that "[m]ost hearsay exceptions covered statements that by their nature were not testimonial-- for example, business records or statements in furtherance of a conspiracy", court found medical records were non-testimonial).

PRACTICE POINTER: Despite Justice Scalia's statement in Crawford that most hearsay exceptions, such as business records, involve non-testimonial statements, each hearsay statement must be analyzed on a case-by-case basis. For instance, if a declarant who is preparing the business record is doing so in anticipation for litigation, then the business record should be considered testimonial. The courts have long recognized that some business records are inadmissible when made in anticipation of litigation. See Palmer v. Hoffman, 318 U.S. 109, 63 S. Ct. 477, (1943) (railroad took statement from the locomotive engineer after a crossing accident; when the engineer died before trial, the railroad offered the statement under the common law 'regular course of business' exception; the report was not within the exception; although the railroad routinely collected accident reports, they were "calculated for use essentially in the court, not in the business."); 2 *McCormick on Evidence* §288, 439 (7th ed.).

Napier v. State, 820 N.E.2d 144 (Ind. Ct. App. 2005) (State's failure to present live testimony at trial from officer who conducted breath tests violated Confrontation Clause in light of Crawford; however, admission of breath test instrument certification documents did not violate Crawford), *aff'd on reh'g*, 827 N.E.2d 565.

See also Rembusch v. State, 836 N.E.2d 979 (Ind. Ct. App. 2005); Jarrell v. State, 852 N.E.2d 1022 (Ind. Ct. App. 2006); Ramirez v. State, 928 N.E.2d 214 (Ind. Ct. App. 2010), *trans. denied*; and Johnson v. State, 879 N.E.2d 649 (Ind. Ct. App. 2008).

But see Cranston v. State, 936 N.E.2d 342 (Ind. Ct. App. 2010) (disagreeing with Napier to the extent Napier can be read to hold the breath test printout to be hearsay; however, agreeing with Napier that the breath test operator must testify in order for the printout to be admissible, but the equipment inspector does not).

Everroad v. State, 998 N.E.2d 739 (Ind. Ct. App. 2013) (mobile phone provider's 'glossary of terms' was not testimonial; detective was allowed to testify about the terms to interpret cell phone records that showed the defendant was near a robbery scene).

Ackerman v. State, 51 N.E.3d 171 (Ind. 2016) (objective circumstances surrounding autopsy report in this case demonstrated that it was not prepared for primary purpose of aiding police investigation, and thus was non-testimonial).

Montgomery v. State, 22 N.E.3d 768 (Ind. Ct. App. 2014), *trans. vacated* (admission of precursor log tracking Sudafed purchases did not violate Confrontation Clause).

State v. Caulfield, 772 N.W.2d 304 (Minn. 2006) (report from a police laboratory identifying a substance seized from a defendant is "testimonial" and its admission at trial without the testimony of the analyst violates the Sixth Amendment right of confrontation).

State v. Renshaw, 915 A.2d 1081 (N.J. Super. 2007) (certification by nurse attesting to fact that she followed medically accepted procedures when taking a blood sample from suspected drunken driver is testimonial).

If a document admitted under the business records exception is considered non-testimonial, the fact that the business record exception is generally considered a firmly rooted hearsay exception will satisfy the reliability concerns of the Sixth Amendment and Article 1, Section 13 of the Indiana Constitution. See Holmes v. State, 671 N.E.2d 841 (Ind. 1996); and L.H. v. State, 682 N.E.2d 795 (Ind. Ct. App. 1997).

h. Police report not admissible under business record exception

Police report does not meet the definition of a business record eligible for exception from the hearsay rule under Rule 803(6). Bacher v. State, 686 N.E.2d 791, n.4 (Ind.1997). See Rule 803(8) for the use of police reports by the accused. "Any report prepared by law enforcement personnel and offered against a criminal defendant that would be excluded as a public record under 803(8) should also be excluded if offered as a business record. Committee Commentary, Ind. R. Evid. 803(6).

Tate v. State, 835 N.E.2d 499 (Ind. Ct. App. 2005) (arrest record was admissible under Rule 803(6) because it was limited to biographical information and type of charge to be brought against arrestee, and did not contain any subjective assumptions,

statements, interpretations, or conclusions that would be prohibited under 803(8), public records exception). See also Payne v. State, 658 N.E.2d 635 (Ind. Ct. App. 1995).

Vaughn v. State, 13 N.E.3d 873 (Ind. Ct. App. 2014) (chain of custody report offered through arresting officer that merely recorded the evidence and did not refer to evidence as cocaine, but rather only as a "rock like substance").

i. Electronically kept records admissible

Electronic or computerized records are admissible under Rule 803(6). Prior to the adoption of Rule 803(6), electronic or computerized records were admissible upon a showing that the equipment was standard.

Brandon v. State, 272 Ind. 92, 396 N.E.2d 365, 370 (1979) (telephone company's business office copies of microfiche records of telephone calls were admissible).

Stark v. State, 489 N.E.2d 43 (Ind. 1986) (machine created original entries, such as an audit tape produced by automatic teller machine, may qualify under Rule 803(6)).

Hare v. State, 467 N.E.2d 7 (Ind. 1984) (computer records to be treated as other business records).

U.S. v. Jackson, 208 F.3d 633 (7th Cir. 2000) ("Internet service providers, however, are merely conduits. The Internet service providers did not themselves post what was on Storm Front and the Euro-American Student Union's web sites. Jackson presented no evidence that the Internet service providers even monitored the contents of those web sites. The fact that the Internet service providers may be able to retrieve information that its customers posted or email that its customers sent does not turn that material into a business record of the Internet service provider").

j. Oral business records inadmissible

The business records exception concerns admissibility of documentary, not testimonial evidence. Baker v. Wagers, 472 N.E.2d 218, 221 (Ind. Ct. App.1984).

7. Absence of a record of a regularly conducted activity - Rule 803(7)

An absence of business record is evidence that a matter is not included in regularly kept records as defined in Rule 803(6), if (a) the evidence is offered to prove the matter's nonoccurrence or nonexistence, and (b) a record was regularly kept for matters of that kind, unless (c) the sources of information or other circumstances indicate a lack of trustworthiness. Indiana Rule of Evidence 803(7).

Where negative results of a search of business records kept in regular course of business rather than business records themselves were admitted, testimony regarding negative results of business records search is admissible. Short v. State, 443 N.E.2d 298 (Ind. 1982).

a. Nonoccurrence of an event

Fed. R. Evid. 803(7) (similar to Indiana's rule) allows the use of business records to show the nonoccurrence of an event. U.S. v. Gentry, 925 F.2d 186, 188 (7th Cir. 1991).

> U.S. v. Gentry, 925 F.2d 186, 188 (7th Cir. 1991) (where defendant was accused of placing a pin in a candy bar in order to make a false report of tampering, testimony from an employee of the manufacturer that there were no other reports of pins in the candy was admissible).

b. Nonexistence of record

There must be at least some first-hand testimony regarding the records or production of the log or journal in which the entry is absent.

> U.S. v. Zeidman and J.O.M. Account Services International, Inc., 540 F.2d 314, 319 (7th Cir. 1976) (accounts manager's testimony that a subordinate searched files and reported that there was no record was admissible; manager described the search as a "normal search" of the files).

8. Public records and reports - Rule 803(8)

Indiana Rule of Evidence 803(8) creates a hearsay exception for records of a public office or agency setting forth (a) its regularly conducted and regularly recorded activities; (b) matters observed pursuant to duty imposed by law and as to which there was a duty to report; and (c) factual findings resulting from a legally authorized investigation. Rule 803(8) resolves hearsay issues but does not make evidence admissible; a public record or report is subject to any other objection under the evidence rules.

> Valdez v. State, 56 N.E.3d 1244 (Ind. Ct. App. 2016) (even assuming documents preferred by defendant fell under public records hearsay exception, it would not guarantee admission; defendant produced no evidence at trial to show that these documents were what he said they were).

a. Rationale

The hearsay exception for public records is based on the assumption that public officials perform their duties properly without motive or interest other than to submit accurate and fair reports. Fowler v. State, 929 N.E.2d 875, 878 (Ind. Ct. App. 2010).

b. Foundation for admissibility

Sponsor of exhibit is not required to have personally made it, filed it or have firsthand knowledge of transaction represented by it. A witness need only testify that the exhibit is part of records kept in routine course of business and placed in the record by authorized person having personal knowledge of the transaction represented at time of entry. McBrady v. State, 459 N.E.2d 719 (Ind. 1984).

c. Exceptions

The following are not within this exception to the hearsay rule: (1) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case; (b) investigative reports prepared by or for a public office, when offered by it in a case in which it is a party; (c) factual findings offered by the government in criminal cases; and (d) factual findings resulting from a special investigation of a particular complaint, case, or incident, except when offered by an accused in a criminal case. Indiana Rule of Evidence 803(8).

(1) Rationale

The exception to Rule 803(8) is meant as a watch guard against reports made in an adversarial setting because there is a possible motive to fabricate the contents of the report. Ealy v. State, 685 N.E.2d 1047, 1054 (Ind.1997). Moreover, factual findings that pertain to a critical and contested issue in the case are worrisome without the presence of the author in court for cross-examination. Id.

(2) Rule 803(8)(c) test of admissibility

Factual findings offered by the government in criminal cases are not admissible under the public records exception to hearsay. Ind. R. Evid. 803(8)(c).

(a) Record involves materially contested issue

First, the court must consider whether the record objected to addresses a materially contested issue in the case. If it does not, then the safeguards provided by the rule sufficiently protect the defendant. Ealy v. State, 685 N.E.2d 1047, 1054 (Ind. 1997).

(b) Factual findings or observations

Second, if findings address a materially contested issue, court must consider the nature of what is objected to. If the court can find that a record or report clearly contains no factual findings, then the evidence is not made inadmissible by 803(8)(c). Such evidence could be simple listings, or a simple recordation of numbers, and the like. Ealy v. State, 685 N.E.2d 1047, 1054 (Ind. 1997).

Generally, "observations" involving no subjective interpretations are admissible under Rule 803(8), while "factual findings," consisting of the product of an investigation that requires the preparer to make an inferential selection between possible truths, are not. Kindel v. State, 649 N.E.2d 117, 118 (Ind. Ct. App. 1995). A finding refers to the result or conclusion drawn by the investigator, whether it be a fire inspector, judge, or jury, from facts without exercise of legal judgment. Ealy v. State, 685 N.E.2d 1047, 1051 (Ind. 1997).

(c) Was report prepared for advocacy purposes

Third, if the evidence does or may contain "factual findings," the court must determine whether the report was prepared for advocacy purposes or in anticipation of litigation. If the report was prepared for advocacy purposes, it is not admissible under Rule 803(8)(c). Ealy v. State, 685 N.E.2d 1047, 1054 (Ind. 1997).

Bailey v. State, 806 N.E.2d 329 (Ind. Ct. App. 2004) (computer log documenting all the contacts between the defendant and the housing authority was admissible unlike a regular police report because it was not prepared for "advocacy purposes or in anticipation of litigation").

Tardy v. State, 728 N.E.2d 904 (Ind. Ct. App. 2000) (unaltered county surveyor's map was admissible under Rule 803(8), but not in its altered condition with a line drawn marking a 1000' radius from school grounds; the alteration was made for purposes of litigation).

PRACTICE POINTER: Rule 803(8)(c)'s requirement that the report not be made for advocacy purposes is consistent with the Sixth Amendment right to confrontation. If a report is made in anticipation of trial, the admission of the report into evidence without the opportunity to cross-examine is unconstitutional. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

(3) Exclusions not applicable to criminal defendant

Investigative reports by police and other law enforcement personnel are admissible when offered by an accused in a criminal case. Wisehart v. State, 693 N.E.2d 23 (Ind. 1998). A criminal defendant may present records and reports that the State is barred from offering. If the criminal defendant presents records or reports that the State is barred from offering, the prosecution may attempt to cross-examine on, and to rebut, the evidence. See United States v. Hudson, 884 F.2d 1016, 1023 (7th Cir. 1989).

Wisehart v. State, 693 N.E.2d 23 (Ind.1998) (police report offered by the defendant at a post-conviction hearing was admissible under public records exception).

United States v. Versaint, 849 F.2d 827 (3d Cir. 1988) (reversing cocaine convictions, court held that trial court erred in excluding police report offered by defendant that described individual other than defendant who participated in drug sales and was written by officer who identified defendant at trial).

PRACTICE POINTER: Public records offered for the sole purpose of impeaching or rehabilitating a witness, and not in order to prove the facts contained therein, are not hearsay under Rule 801(c).

d. Types of reports

(1) Law enforcement reports

(a) Probable cause affidavits

Rhone v. State, 825 N.E.2d 1277 (Ind. Ct. App. 2005) (a probable cause affidavit, offered by the State, was inadmissible because 803(8) specifically excludes investigative reports by police from hearsay exception; the affidavit addressed a materially contested issue in the case that included factual findings and was prepared for advocacy purposes).

McMillen v. State, 169 N.E.3d 437 (Ind. Ct. App. 2021) (in proving defendant's prior battery to elevate the instant offense, the State offered the charging information from prior case, probable cause affidavit, law enforcement investigative reports, the plea agreement, and sentencing order which were all certified by the county clerk; the probable cause affidavit and the law enforcement officer's investigation report do not fall within the public records exception but the remaining documents do).

(b) Investigative

Police investigative reports, offered by the State, are covered by the specific provisions of Rule 803(8) and not the more general provisions of business records under Rule 803(6). Bacher v. State, 686 N.E.2d 791, n.4 (Ind. 1997). Thus, police reports inadmissible under the public records exception are also inadmissible under the business records exception.

(c) Accident report

Shepherd v. State, 690 N.E.2d 318, 327 (Ind. Ct. App.1997), *trans. denied* (Indiana Officer Standard Crash Report admissible under IC 9-26-3-4 was most likely not admissible under 803(8) when offered by the State being it involved opinions and a material, disputed issue).

(d) Diagrams & Maps

Sparkman v. State, 722 N.E.2d 1259 (Ind. Ct. App. 2000) (trial court erred in admitting map from county surveyor's office that contained radius line showing distance between Defendant's site of arrest and public park that was less than 1000 feet away).

Shepherd v. State, 690 N.E.2d 318, 326-27 (Ind. Ct. App. 1997) (the State admitted a diagram of an accident scene, offered by the State, made by the testifying trooper related to the identity of the driver, the sole contention at trial; however, because the information in the diagram did not constitute factual findings but was merely a recordation of physical conditions as they were observed, the diagram was admissible under Rule 803(8)).

(e) Return of service

Gaines v. State, 999 N.E.2d 999 (Ind. Ct. App. 2013) (certificate of service on an *ex parte* protective order was non-testimonial; it was primarily created for an administrative purpose, not for use at trial, and its admission to show that defendant had notice of the protective order did not violate the Confrontation Clause).

(2) Booking reports

Allen v. State, 994 N.E.2d 316 (Ind. Ct. App. 2013) (State's booking report exhibit fell within ambit of Rule 803(8) and was not subject to police records exclusion because it listed only non-adversarial information such as defendant's age, address, height, weight, jail where he was held, and charge on which he was arrested).

(3) Autopsy reports

Autopsy reports may be admissible under the public records exception. Ealy v. State, 685 N.E.2d 1047 (Ind. 1997).

(4) BMV records

BMV records of a defendant's habitual traffic offenses are admissible under public records under the Rule. Coates v. State, 650 N.E. 2d 58, 63 (Ind. Ct. App. 1995) (*citing* Miller, 13 *Indiana Evidence,* 653 § 803.108 (1995)).

(a) Certification

Public records cannot be placed in evidence merely upon party's offering copy and claiming it to be accurate copy of original. The BMV, not the prosecutor's office, must certify the records as true and accurate. Dumes v. State, 718 N.E.2d 1171 (Ind. Ct. App. 1999). Allowing a party to certify and authenticate documents which it is introducing into evidence effectively defeats the purposes of authentication requirements imposed by Indiana Trial Rules, Rules of Evidence, and Indiana Statutes. Dumes v. State, 723 N.E.2d 460 (Ind. Ct. App. 1999), *ref'd on reh'g*, 718 N.E.2d 1171.

Dumes v. State, 718 N.E.2d 1171 (Ind. Ct. App. 1999) (prosecutor's paralegal, who obtained defendant's driving record from internet, could not certify the records as true and accurate, and thus, the record was not admissible as a public record).

Carpenter v. State, 743 N.E.2d 326 (Ind. Ct. App. 2001) (one certification by BMV on the front of a packet of documents stating that the certification relates to "the attached" was sufficient).

PRACTICE POINTER: While copies of public records are admissible if authenticity is properly certified, certifications themselves are not public records and if genuine issue as to authenticity is raised, copies of certification are not acceptable. Harwood v. State, 582 N.E.2d 359 (Ind. 1991); cf., James v. State ex rel. Com'r of Motor Vehicles, 475 N.E.2d 1164 (Ind. Ct. App. 1985) (signature certifying document is valid even if stamped facsimile); Andrews v. State, 532 N.E.2d 1159 (Ind. 1989) (certification in which name and number of another person had been whited out, and the defendant's name typed over it, was proper, on basis of State's representation that exhibits were in this form when received from Illinois Court which issued judgments in question).

(b) Prior Convictions

Although convictions on a driving record are gathered from documents or entities outside of the BMV, the BMV records are regularly maintained pursuant to a duty imposed by statute and thus, qualify as "observations," not as "investigative reports." Kindel v. State, 649 N.E.2d 117, 118 (Ind. Ct. App. 1995).

In issue of first impression, trial court did not abuse discretion in admitting evidence of Defendant's Florida *nolo contendere* plea to murder to prove he was convicted of an offense that qualified him as a serious violent felon under Ind. Code § 35-47-4-5(a), even though Rule of Evidence 803(22) does not allow admission of evidence of a final judgment entered upon a plea of *nolo contendere* "to prove an fact essential to sustain the judgment." Scott v. State, 925 N.E.2d 169 (Ind. Ct. App. 2010), *trans. denied*. Because record of *nolo contendere* plea was not admitted to show actual guilt but the fact that Defendant was convicted of murder, record of *nolo contendere* plea was admissible under Rule of Evidence 803(8). Id.

PRACTICE POINTER: Although a list of prior convictions on a driving record may fall under an exception to hearsay, these prior convictions may be inadmissible under Indiana Rule of Evidence 401 (relevancy), 403 (prejudice) and 404(b) (prior acts). See Jones v. State, 708 N.E. 2d 37 (Ind. Ct. App. 1999); Dumes v. State, 718 N.E.2d 1171 (Ind. Ct. App. 1999), *supplemented on reh'g*, 723 N.E.2d 460; Harris v. State, 878 N.E.2d 534 (Ind. Ct. App. 2007); but see Carpenter v. State, 743 N.E.2d 326 (Ind. Ct. App. 2001)).

(c) Determination of Habitual Violator Status

The finding by the BMV of habitual violator status is not the product of an investigation that requires the BMV to make inferential selections between possible truths and is not an inadmissible factual finding. Thus, the BMV records are admissible under the public records exception. Kindel v. State, 649 N.E.2d 117, 119 (Ind. Ct. App. 1995); but see Coates v. State, 650 N.E. 2d 58 (Ind. Ct. App. 1995) (records did not constitute "observations," but are a compilation of the BMV's regularly conducted and regularly recorded activities and, thus, fall within the hearsay exception in Rule 803(8)). Although based on different reasoning, both the Kindel and the Coates courts found the admission of the records proper.

(5) HUD records

Bailey v. State, 806 N.E.2d 329 (Ind. Ct. App. 2004) (defendant's housing applications, which included an addendum that informed applicants of the notification requirement and was initialed by the defendant, was a public record, admissible based on police officer's testimony that the documents are standard, required by HUD and prepared by the legal department in regular course of its business, and stored in a secure location).

9. Records of vital statistics - Rule 803(9)

"A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty" are admissible hearsay. Indiana Rule of Evidence 803(9).

Some commentators suggest that the rule permits the contents of such records to be admitted as substantive evidence, thereby facilitating the proof of a wide variety of information contained in such documents. See 4 Weinstein 803(9), at 803-281 to 803-294 (1984); Miller, 13 *Indiana Evidence*, § 803.109 (4th ed. 2016).

Reliability of these documents is found in the disinterested private individual's legal duty to make the report. See 2 *McCormick on Evidence,* § 297, 471 (7th ed.).

The pedigree exception prior to the 1994 adoption of the Indiana Rules of Evidence required that the declarant be dead. In re Paternity of Tompkins*,* 542 N.E.2d 1009 (Ind. Ct. App. 1989).

10. Absence of public record or entry - Rule 803(10)

Indiana Rule of Evidence 803(10) provides a hearsay exception for testimony or a certificate under Rule 902 that a diligent search failed to disclose a given public record or statement, when the evidence is offered to show either that the record or statement does not exist or, if a public officer regularly kept a record or a statement for a matter of that kind, that a matter did not happen or exist.

Rule 803(10) is similar in effect to Rule 803(7).

Wilson v. State, 727 N.E.2d 775 (Ind. Ct. App. 2000), *sum. aff'd,* 745 N.E.2d 789 (Ind. 2001) (letter that stated search of records showed that the defendant did not have a gun license prior to Feb. 25, 1999, was absence of public record, which is an exception to hearsay).

a. Method of establishing absence of record

Evidence that a diligent search failed to disclose an entry or record may be presented by certification under Rule 902, IC 34-40-1-1 *et. seq.* (not available in criminal cases), or by trial testimony. Indiana Rule of Evidence 803(10); Miller, 13 *Indiana Evidence*, 422-23 § 803.110 (4th ed.).

b. Diligence Requirement

Regardless of how the proof is offered, the key to satisfying Rule 803(10) is evidence that a diligent search failed to disclose the existence of the absent record. A casual or partial search cannot justify the conclusion that there was no record. Saltzburg, et al., *Federal Rules of Evidence Manual,* vol. 4, p. 803-246 (10th ed. 1994) (*citing* United States v. Robinson, 544 F.2d 110 (2d Cir. 1976).

c. Right to confrontation

The prosecution's use of a certificate under Rule 902(4) or 902(11) is likely to implicate the defendant's constitutional confrontation rights. Bullcoming v. New Mexico, 564 U.S. 647, 131 S. Ct. 2705, 2710 (2011).

11. Records of religious organizations concerning personal or family history - Rule 803(11)

"A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization" are admissible hearsay. Indiana Rule of Evidence 803(11).

a. Financial records not covered

Indiana Rule of Evidence 803(11) refers only to "statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history . . ." Id.

> Hall v. Commissioner, 729 F.2d 632 (9th Cir. 1984) (church records properly excluded where they were not shown to be business records, and statements of contributions to a church did not qualify as religious records under Rule 803(11)).

b. Distinguished from business records exception

Frequently, records that qualify for admissibility under Rule 801(11) would also be admissible under the business records exception (Rule 803(6)). However, Rule 803(11) does not require the statement to have been made by a person with a business or religious duty to report the matter, or that the person making the entry have personal knowledge of the matter recorded. See Advisory Committee's *Note to Fed.R.Evid. 803(11)*; 4 Weinstein 803(11), at 803-04 (1984).

12. Marriage, Baptismal, and Similar Certificates - Rule 803(12)

Statements of fact "contained in a certificate: (A) made by a person who is authorized by a religious organization or by law to perform the act certified; (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and (C) purporting to have been issued at the time of the act or within a reasonable time after it" are admissible hearsay. Indiana Rule of Evidence 803(12).

a. Rationale

"The basis of the hearsay exception is that the maker being authorized by a religious organization or by law to make the certificate is very unlikely to fabricate on such an occasion." Graham, 30C *Federal Practice & Procedure: Evidence* § 803.12 (7th ed.), at 441 (2011).

b. Foundation

All of the following must be proven:

(1) Statement must state that the maker performed a marriage or other ceremony or administered a sacrament.

(2) Statement must be contained in a certificate made by a clergyman, public official, or other person authorized by a religious organization's rules or practices or by law to perform the act certified.

(3) Statement must purport to have been issued at the time of, or within a reasonable time after, the act certified.

Miller, 13 *Indiana Evidence,* 425 § 803.112 (4th ed. 2016).

13. Family records - Rule 803(13)

A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, engraving on an urn, crypt, or burial marker. Indiana Rule of Evidence 803(13).

a. Genealogy reports

A witness may rely on a genealogist's report to provide proof of pedigree. Emberry Community Church v. Bloomington Dist. Missionary and Church Extension Society, Inc., 482 N.E.2d 288, 292 (Ind. Ct. App. 1985).

> Emberry Community Church v. Bloomington Dist. Missionary and Church Extension Society, Inc., 482 N.E.2d 288, 292 (Ind. Ct. App. 1985) (although witness's independent recollection of family history was lacking and she relied in part upon a genealogist's report, these purported deficiencies went to the weight rather than the admissibility of her testimony).

b. Records need not have been prepared by family member

Proponent need not prove that the records were prepared by a family member or a person with firsthand knowledge of the facts recorded. It is sufficient to show that the item was recognized by the family sufficiently to conclude that the family adopted the statement, and no other authentication is required. Saltzburg, et al., *Federal Rules of Evidence Manual,* vol. 3, p. 1430 (6th ed. 1994).

14. Records of documents affecting an interest in property - Rule 803(14)

"The record of a document that purports to establish or affect an interest in property if: (A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it; (B) the record is kept in a public office; and (C) a statute authorizes recording documents of that kind in that office" is admissible hearsay. Indiana Rule of Evidence 803(14).

a. Consistent with prior Indiana law

The Evidence Rules did not change prior Indiana law allowing a deed or conveyance recorded with the proof or certificate of grantor's acknowledgment to prove the conveyance. See Patterson v. Dallas, 46 Ind. 48 (1874). Rules 902 and 1005 address issues of authentication and the original documents rule when the recorded document is offered.

b. Foundation

The proponent of the evidence must establish all of the following:

(1) The document purports to establish or affect an interest in property.

(2) The record offered into evidence is one of a public office.

(3) An applicable statute authorized the recording in that office of documents of that kind; and

(4) the record is offered to prove its content and execution.

Miller, 13 *Indiana Evidence,* 428-29 § 803.114 (4th ed. 2016).

15. Statements in documents that affect an interest in property - Rule 803(15)

"A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose - unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document" is admissible hearsay. Indiana Rule of Evidence 803(15).

a. Rationale

The rule is necessary because litigation may arise so many years after a conveyance that declarants and witnesses to the transaction may be unavailable. Statements in dispositive documents are sometimes the only means of establishing facts that are not genuinely controverted. Stahl v. State, 686 N.E.2d 89 (Ind.1997) (*citing* 5 *Weinstein's Federal Evidence,* Sec. 803(15)(1)).

b. Reliability of documents under Rule 803(15)

The documents covered by Rule 803(15) are presumptively reliable, by reason of passage of time and the importance of a well-planned transaction at the time it was done. Reliability is an implicit requirement of Rule 803(15). However, the exception has been

held to apply to other documents affecting or establishing an interest in property, even if not dispositive in nature. Stahl v. State, 686 N.E.2d 89 (Ind.1997) (*citing* 5 *Weinstein's Federal Evidence,* Sec. 803(15)(1)).

c. Foundation

(1) Circumstances must generate confidence in reliability and indicia of truthfulness

Anything relating to a commercial transaction may be argued to "affect an interest in property." However, the document must be executed in circumstances that generate confidence in its reliability. The more recent its creation, the more carefully the document's reliability must be examined. The circumstances under which the document was generated must also establish the indicia of reliability that Rule 803(15) assumes. It must be ancient or dispositive. It may not be created in conjunction with the very transaction giving rise to the lawsuit in which it is offered. And there may not be circumstances under which there may be a motive to supply an incorrect document. For non-dispositive documents, the burden is steeper. Stahl v. State, 686 N.E.2d 89 (Ind. 1997).

Stahl v. State, 686 N.E.2d 89, 93-94 (Ind. 1997) (affidavit of account holder concerning unauthorized use of his ATM card was not created under circumstances establishing sufficient indicia of trustworthiness; affidavit was recently created in conjunction with transaction giving rise to case, although it did affect property interest).

(2) Inherent reliability of dispositive documents

Under Rule 803(15) some documents, usually dispositive ones (e.g., deeds, bills of sale, etc.), are regarded as inherently reliable. If a document actually constitutes the instrument of transfer, as in the case of a deed, the statements recited in the document are likely to be reliable because the instrument was carefully drawn and was not created for purposes of the current controversy. They typically have the added assurance that they are negotiated documents where at least one party, usually the purchaser, is strongly motivated to see that they are accurate, and a misrepresentation may generate adverse consequences to the other. Stahl v. State, 686 N.E.2d 89, 93-94 (Ind.1997).

d. Self-authenticating under Rules 901 and 902

Documents under this hearsay exception may be self-authenticating under any of the following:

(1) Rule 902(1), concerning domestic public documents.

(2) Rule 902(9), regarding certified domestic records of regularly conducted activities.

(3) Rule 901(b)(8), regarding ancient documents.

16. Statements in Ancient Documents - Rule 803(16)

Rule 803(16) permits the use of statements in a document that is at least thirty (30) years old and whose authenticity is established. Rule is not limited to legal documents. Newspaper articles of sufficient vintage can qualify if properly authenticated, as can private correspondence and other documents. Graham, 30C *Federal Practice & Procedure: Evidence* § 803.16 (7th ed.), at 445 (2011).

a. Rule 803(16) exception applies only to document itself

This exception applies only to the document itself. If the document contains more than one level of hearsay, an appropriate exception must be found for each level. U.S. v. Hajda, 135 F.3d 439, 444 (7th Cir. 1998).

b. See Rule 901(b)(8) for authentication

Rule 803(16) complements Rule 901(b)(8), which provides for the authentication of a document that is at least thirty years old, that is in a place where the authentic document would likely be, and that is in such condition as to create no suspicion as to its authenticity. Threadgill v. Armstrong World Industries, Inc., 928 F.2d 1366, 1375 (3rd Cir.1991).

17. Market reports and similar commercial publications - Rule 803(17)

"Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations" are admissible hearsay. Indiana Rule of Evidence 803(17).

a. Prior law and rationale

Indiana Rule of Evidence 803(17) expanded the prior law. Committee, Ind. R. Evid. 803(17). The rationale for this exception is based on the public's customary reliance on such publications, combined with the publisher's interest in accuracy and lack of motivation to testify. Graham, 30C *Federal Practice & Procedure: Evidence* § 803.17 (7th ed.), at 456 (2011).

b. Foundation

The proponent must show that those in the pertinent trade generally use and rely upon the publication. Mueller & Kirkpatrick, Federal Evidence § 8:101 (4th ed), at 906.

> Washington v. State, 178 N.E.3d 1275 (Ind. Ct. App. 2021) (the market reports exception to hearsay under Evidence Rule 803(17) does not apply to allow the admission of evidence from Drugs.com that was used to identify pills for possession charges; State failed to show website is reliable source for drug identification).

Fedij v. State, 186 N.E.3d 696 (Ind. Ct. App. 2022) (writings and symbols on packaging of unregulated and illegal products such as edibles are hearsay and inadmissible under market reports hearsay exception).

Hernandez v. State, 563 N.E.2d 560, 562-63 (Ind. 1990) (inaccuracy problems with newspaper TV listings are within province of jury to assess credibility and weight of evidence).

U.S. v. Johnson, 515 F.2d 730, 732 n.4 (7th Cir. 1975) (weaknesses inherent in the use of market report data or commercial publications may be brought out on cross-examination).

c. Examples

(1) Labels

Labels on containers and packages are admissible if they are generally relied upon by the public or by persons in particular occupations and if there is some evidence that at the time the package or container was seized, the contents are the original contents. Forler v. State, 846 N.E.2d 266 (Ind. Ct. App. 2006) (*citing* Reemer v. State, 835 N.E.2d 1005 (Ind. 2005)).

Reemer v. State, 835 N.E.2d 1005 (Ind. 2005) (labels of commercially marketed drugs are admissible under the "market reports, commercial publications" exception to hearsay rule, Indiana Evidence Rule 803(17), to prove composition of drug; expert witnesses or laboratory results are not required to prove the composition of over the counter or prescription drug when it is found in an unaltered state and its weight and contents are described in required label).

Montgomery v. State, 22 N.E.3d 768 (Ind. Ct. App. 2014), *trans. vacated* (the rationale set forth in Reemer applies equally to packaging for items containing poisonous chemicals).

Forler v. State, 846 N.E.2d 266 (Ind. Ct. App. 2006) (label admissible to show ingredients of aerosol can of starting fluid, but admission of label to show ingredients of Liquid Fire, contained in bottle with screw on cap, may have been error).

(2) Newspapers

Although newspapers, by their very nature, are hearsay, market quotations, tabulations, lists, directories, or other compilations published in the newspaper fall under an exception to hearsay. Feliciano v. State, 467 N.E.2d 748 (Ind. 1984) (newspaper article hearsay); cf. Connell v. State, 470 N.E.2d 701 (Ind. 1984) (reports of regular markets for goods, including securities, published in newspapers of general circulation, as proof of value are admissible).

Connell v. State, 470 N.E.2d 701 (Ind. 1984) (listing of TV programs for day the crime occurred to rebut witness alibi testimony was admissible).

(3) Red Book/Blue book

U.S. v. Johnson, 515 F.2d 730 (7th Cir.1975) (in a case involving stolen cars, it was proper to admit the "Red Book," of car values under Rule 803(17) of the Federal Rules of Evidence).

(4) Mortality tables

Connell v. State, 470 N.E.2d 701, 706 (Ind. 1984) (mortality tables are admissible under this hearsay exception). See also McCue v. Law, 179 Ind. App. 372, 385 N.E.2d 1162 (1979).

18. Learned treatises, periodicals, or pamphlets - Rule 803(18)

Indiana Rules of Evidence 803(18) permits into evidence "A statement contained in a treatise, periodical, or pamphlet if: (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; (B) the statement contradicts the expert's testimony on a subject of history, medicine, or other science or art; and (C) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.. If admitted, the statement may be read into evidence but not received as an exhibit."

PRACTICE POINTER: Rule 803(18) is often used to challenge the State expert's opinion on cross-examination, even if the defense does not have its own expert. For a sample foundation using the influential 2009 report prepared under the auspices of the National Academy of Science, entitled *Strengthening Forensic Sciences in the United States: A Path Forward*, see Imwinkelried, *Criminal Evidentiary Foundations* §10.20[3] (3rd ed. 2016), at 653.

a. Prior law and current Rule

Prior to the adoption of the Rules of Evidence, learned treatises were not admissible as independent evidence. Kavanagh v. Butorac, 140 Ind. App. 139, 154, 221 N.E.2d 824, 833 (1966); Epps v. State, 102 Ind. 539, 459-50 (1885). However, they were admissible for impeachment purposes. Hess v. Lowrey, 122 Ind. 225, 233-34, 23 N.E. 156, 158 (1890).

Now, the treatise, periodical or pamphlet must be established as a reliable authority by the testimony or admission of a witness or by other expert testimony or by judicial notice. Rule 803(18) applies only to the extent that the treatise is either relied upon by an expert witness during direct examination or is used to impeach the expert during cross examination. U.S. v. Vital Health Prods, Ltd., 786 F. Supp. 761, 771 (E.D. Wis. 1992).

> Lindhorst v. State, 90 N.E.3d 695 (Ind. Ct. App. 2017) (trial court was not obligated to accept defense counsel's statement that he would demonstrate later in the case that the Journal of Forensic Medicine and Pathology was a reliable source; in the absence of authentication, thus, trial court did not err in limiting defendant's cross-examination of State's expert witness about the medical journal).

b. Foundation

See Imwinkelried, *Criminal Evidentiary Foundations* §10.20[2] (3rd ed. 2016), at 653.

1. A witness, qualified as an expert under Rule 702, is on the witness stand.

2. A treatise, periodical, or pamphlet contains a passage dealing with the subject matter of the expert's testimony.

3. The proponent brings the treatise, periodical, or pamphlet to the expert's attention.

4. The treatise, periodical, or pamphlet has been published.

5. The treatise, periodical, or pamphlet is "a reliable authority" on the subject. See Twin City Fire Ins. Co. v. Country Mut. Ins. Co., 23 F.3d 1175, 1183 (7th Cir. 1994).

c. Relationship to Rule 703

Under Rule 703, experts can base their opinions on information of the type reasonably relied upon by experts, but the information itself may not be independently admissible in evidence. Finchum v. Ford/Kia, 57 F.3d 526, 531-32 (7th Cir. 1995) (although plaintiff's expert might have been permitted to state that he relied upon the exhibit in forming his opinion, the plaintiffs could not have introduced the exhibit into evidence because of the hearsay rule).

However, under 803(18), contradictory passages from treatises, publications or pamphlets relied upon by the expert or recognized as reliable authority may be read into evidence.

d. May only be read into evidence, not offered as exhibit

Statements contained in a published periodical which are relied upon by an expert witness may be admitted, but they must be read into evidence rather than received as exhibits. Finchum v. Ford/Kia, 57 F.3d 526, 531-32 (7th Cir. 1995).

19. Reputation concerning personal or family history - Rule 803(19)

"A reputation among a person's family by blood, adoption, or marriage - or among a person's associates or in the community - concerning the person's birth, adoption, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history" is admissible hearsay. Indiana Rule of Evidence 803(19).

This rule is similar to the pedigree exception previously allowed in Indiana under common law. The pedigree exception found in State v. Schaller, 40 N.E.2d 976 (Ind. 1942), suggested that proof of pedigree is restricted to the declarations of deceased persons. Emberry Community Church v. Bloomington Dist. Missionary and Church Extension Soc., Inc., 482 N.E.2d 288, 292 (Ind. Ct. App. 1985).

Emberry Community Church v. Bloomington Dist. Missionary and Church Extension Soc., Inc., 482 N.E.2d 288, 292 (Ind. Ct. App. 1985) (because witness stated that she discussed her family history with her mother prior to her mother's death, witness's testimony, founded upon declarations of her deceased mother, was admissible under the Schaller formulation of the pedigree exception).

In re The Paternity of Tompkins, 542 N.E.2d 1009, 1012-13 (Ind. Ct. App. 1989) (the relationship of the witness to the declarant is irrelevant so long as the testimony is of the statements of the declarant, *ante litem motam*, and not what friends and neighbors thought).

Specific statements by others concerning an individual's personal or family history are governed by Rule 804(b)(4), which requires that the declarant be unavailable to testify.

20. Reputation concerning boundaries or general history - Rule 803(20)

"Reputation in a community - arising before the controversy - concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state or nation" is admissible hearsay. Indiana Rules of Evidence 803(20).

a. Specific statements or assertions prohibited

The exception applies only to reputation or general consensus evidence and does not permit the admission of specific statements or assertions made by the predecessor in interest regarding a boundary. Roser/McPeak v. Silvers, 698 N.E.2d 860 (Ind. Ct. App. 1998).

Roser/McPeak v. Silvers, 698 N.E.2d 860 (Ind. Ct. App. 1998) (harmless error for trial court to admit statements of deceased landowner regarding location of a boundary line to property in quiet title action).

Ellison v. Branstrator, 153 Ind. 146, 54 N.E. 433, 437 (1899) (no error in excluding evidence of a conversation with a surveyor regarding boundary line).

b. Examples

Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32, 35 (1986) (witnesses were permitted to testify regarding the use of local roadways before their lifetimes).

Williams v. State, 595 So. 2d 1299, 1306 (Miss. 1992) (evidence that property had been known by a certain name for years was admissible).

21. Reputation as to character - Rule 803(21)

Indiana Rule of Evidence 803(21) provides for the admission of reputation of a person's character among associates or in the community.

a. Example

U.S. v. Penson and Surratt, 896 F.2d 1087, 1093 (7th Cir. 1990) (testimony as to statements made by other persons about defendant locating trucks and drivers for the transport of marijuana admissible under Federal Rules of Evidence 803(21) to show defendant's "good reputation" in the drug-trafficking community).

b. Personal knowledge not required

The rule does not require that the witness's knowledge of the person's reputation be shown to stem from one with personal knowledge of the person whose reputation is being shown. See Snow v. Whitney Fidalgo Seafoods, Inc., 38 Wash. App. 220, 686 P.2d 1090, 1096 (1984).

22. Judgment of previous conviction - Rule 803(22)

Indiana Rule of Evidence 802(22) provides for the admission of "[e]vidence of a final judgment of conviction if: (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea; (B) the conviction was for a crime punishable by death or by imprisonment for more than a year; (C) the evidence is admitted to prove any fact essential to the judgment; and (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant. The pendency of an appeal may be shown but does not affect admissibility."

a. Felony conviction admissible, but not conclusive

A criminal felony judgment may be admitted in evidence. However, the conviction is not necessarily conclusive proof in the civil trial of the factual issues determined by the criminal judgment, and the evidence transcript is not necessarily admissible. Kimberlin

v. DeLong, 637 N.E.2d 121, 124 (Ind.1994), *cert. den.,* 516 U.S. 829, 116 S. Ct. 98, 133 L. Ed. 2d 53.

Misdemeanor and infraction convictions are not within the scope of Rule 803(22). Lepucki v. Lake County Sheriff's Dep't, 801 N.E.2d 636, 640 (Ind. Ct. App. 2003).

b. Conviction of third person not allowed as evidence under this Rule

U.S. v. Koger, 646 F.2d 1194 (7th Cir. 1981) (accused was prosecuted for receiving and possessing stolen property; it was improper to allow the introduction of evidence of the conviction of the thieves of the property in a separate non-related proceeding). See Kirby v. United States, 174 U.S. 47, 19 S. Ct. 574 (1899).

PRACTICE POINTER: The exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. This would violate the defendant's right to confrontation under the 6th and 14th Amendments to the U.S. Constitution and Article 1, Section 13 of the Indiana Constitution.

c. Statements of complaining witnesses incorporated in criminal complaint leading to judgment of conviction inadmissible

Rule 803(22), which applies specifically to judgments of conviction, does not operate to admit the statements of complaining witnesses incorporated in a criminal complaint. The statements found in the complaint, however, may be admissible under another hearsay exception, or may not even be hearsay. Bell v. City of Milwaukee, et al, 746 F.2d 1205, 1273 (7th Cir. 1984), *overruled on other grounds by* Russ v. Watts, 414 F.3d 7883 (7th Cir. 2005).

d. Even though a *nolo contendere* plea is not admissible to prove any fact necessary to sustain the judgment, it is admissible to prove fact that Defendant was convicted

Scott v. State, 924 N.E.2d 169 (Ind. Ct. App. 2010), *trans. denied*. In issue of first impression, trial court did not abuse discretion in admitting evidence of Defendant's Florida *nolo contendere* plea to murder to prove he was convicted of an offense that qualified him as a serious violent felon under Ind. Code § 35-47-4-5(a), even though Rule of Evidence 803(22) does not allow admission of evidence of a final judgment entered upon a plea of *nolo contendere* "to prove an fact essential to sustain the judgment." Because record of *nolo contendere* plea was not admitted to show actual guilt but the fact that Defendant was convicted of murder, record of *nolo contendere* plea was admissible under Rule of Evidence 803(8). Id.

23. Judgments involving personal, family, or general history, or a boundary - Rule 803(23)

"A judgment that is admitted to prove a matter of personal, family or general history, or boundaries, if the matter: (A) was essential to the judgment; and (B) could be proved by evidence of reputation" is admissible hearsay. Indiana Rule of Evidence 803(23).

A judgment, insofar as it fixes property rights, should be admissible as the official record of such rights, just like other documents of title. See Rule 803(14). A practical reason for denying a judgment evidentiary effect is the difficulty of weighing the judgment, considered as evidence, against whatever contrary evidence a party to the current suit might present. Greycas v. Proud, 826 F.2d 1560, 1567 (7th Cir. 1987), *cert. den.,* 484 U.S. 1043, 108 S. Ct. 775.

D. STATUTORY EXCEPTION: Protected persons/ child hearsay I.C. 35-37-4-6

1. Purpose: makes otherwise inadmissible evidence admissible

Pursuant to I.C. 35-37-4-6(d), a statement or videotape that:

(1) is made by a person who at the time of trial is a protected person;
(2) concerns an act that is a material element of an offense listed in subsection (a) or (b) that was allegedly committed against the person; and
(3) is not otherwise admissible in evidence;

is admissible in evidence in a criminal action for an offense listed in subsection (a) or (b) if the requirements of subsection (e) are met.

The protected person statute makes certain otherwise inadmissible hearsay statements admissible. The out-of-court statement of a protected person admissible under IC 35-37-4-6 may be a statement related by other persons at trial or it may be a videotaped statement of the declarant. Because the statements contemplated by IC 35-37-4-6 are usually made outside the presence of the defendant, or his attorney, or both, these statements are subject to core statutory and constitutional requirements before they may be admitted as evidence.

2. Applicability

I.C. 35-37-4-6 only applies to statements made by protected persons and that concern a material element of one of the specified offenses.

D.G.B. v. State, 833 N.E.2d 519 (Ind. Ct. App. 2005) (protected person statute is applicable to juvenile proceedings). See also J.V v. State, 766 N.E.2d 412 (Ind. Ct. App. 2002).

a. Protected persons

The statement or videotape must have been made by a person who is a 'protected person' at the time of trial. IC 35-37-4-6(d)(1).

(1) Child less than 14 years old

A protected person means a child less than 14 years of age. I.C. 35-37-4-6(c)(1).

(2) Certain mentally disabled individual

A protected person means a mentally disabled individual who has a disability attributable to an impairment of general intellectual functioning or adaptive behavior that is manifested before the individual is eighteen (18) years of age, is likely to continue indefinitely, constitutes a substantial impairment of the individual's ability to function normally in society, and reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated. I.C. 35-37-4-6(c)(2).

(3) Adult who cannot care for himself

A "protected person" means an individual who is at least eighteen (18) years of age and is incapable by reason of mental illness, intellectual disability, dementia or other physical or mental incapacity of managing or directing the management of the individual's property or providing or directing the provision of self-care. I.C. 35-37-4-6(c)(3).

b. Statement concerns a material element of specified crimes

The statement or videotape must concern an act that is a material element of a charged offense listed in subsection (a) or (b). IC 35-37-4-6(d)(2).

(1) Protected person under I.C. 35-37-4-5(c)(1) and (2)

This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(1) or (c)(2):

(1) Sex crimes (IC 35-42-4).
(2) Battery upon a child (IC 35-42-2-1(a)(2)(B)).
(3) Kidnapping and confinement (IC 35-42-3).
(4) Incest (IC 35-46-1-3).
(5) Neglect of a dependent (IC 35-46-1-4).
(6) Human and sexual trafficking crimes (IC 35-42-3.5)
(7) An attempt under IC 35-41-5-1 for an offense listed in subdivisions (1) through (6).

(2) Protected person under I.C. 35-37-4-5(c)(3)

This section applies to a criminal action involving the following offenses where the victim is a protected person under subsection (c)(3):

(1) Exploitation of a dependent or endangered adult (IC 35-46-1-12).
(2) A sex crime (IC 35-42-4).
(3) Battery (IC 35-42-2-1).
(4) Kidnapping, confinement, or interference with custody (IC 35-42-3).

(5) Home improvement fraud (IC 35-42-6).
(6) Fraud (IC 35-43-5).
(7) Identity deception (IC 35-43-5-3.5).
(8) Synthetic identity deception (IC 35-43-5-3.8).
(9) Theft (IC 35-43-4-2).
(10) Conversion (IC 35-43-4-3).
(11) Neglect of a dependent (IC 35-46-1-4).
(12) Human and sexual trafficking crimes (IC 35-42-3.5).

3. Notice and hearing required

a. Notice

A statement or videotape may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney at least ten (10) days before the trial of: (1) the prosecuting attorney's intention to introduce the statement or videotape in evidence; and (2) the content of the statement or videotape. I.C. 35-37-4-6(g). In order to be reversible error, the defendant must have been prejudiced by the admission of the statements without notice or a hearing. Weis v. State, 825 N.E.2d 896 (Ind. Ct. App. 2005).

Poffenberger v. State, 580 N.E.2d 995 (Ind. Ct. App. 1991) (defendant had sufficient notice of State's intent to use tape where a pretrial order indicated State might use recorded statement of child molestation victim and that defendant could obtain transcript of statement).

Stahl v. State, 497 N.E.2d 927 (Ind. Ct. App.1986) (adequate notice of State's intent to introduce videotape statement of child molestation victim into evidence where State's record of discovery stated that videotaped statements were taken from two victims and listed them as possible witnesses and included substantial disclosure of content of statements by incorporating probable cause affidavit by reference).

Hopper v. State, 489 N.E.2d 1209 (Ind. Ct. App.1986) (adequate notice where defendant was aware at least six months before trial of contents of statement and of state's intention to introduce statement at trial).

b. Hearing

(1) Requirements

A hearing on the admission of a statement under the protected person's statute is required. I.C. 35-37-4-6(e). The hearing must meet the following requirements:

(1) The hearing must be outside the presence of the jury. I.C. 35-37-4-6(e).
(2) The protected person must attend the hearing in person or by using closed circuit testimony as described in section 8(f) and 8(g). I.C. 35-37-4-6(e).
(3) The defendant must have notice of the hearing. I.C. 35-37-4-6(e).

(4) The defendant has the right to be present at the hearing. I.C. 35-37-4-6(c).

(5) The protected person must testify at the trial, or if found to be unavailable as a witness, be available for cross-examination either at the hearing or when the statement was made. Pierce v. State, 677 N.E.2d 39, 44 (Ind. 1997) (*citing* I.C. 35-39-4-6(d)-(e)).

Pierce v. State, 677 N.E.2d 39 (Ind. 1997) (exercising its supervisory powers, the court held fairness to the defendant will normally require giving the defendant the option to have cross-examination of the complaining witness videotaped and later shown to the jury along with the tape of other statements admitted under the protected person statute).

The question of whether the defendant's failure to call the child to testify is a waiver of the right of confrontation is open for the determination of the trial court. If defendant does not waive the right by failing to call the protected person, the trial court must affirmatively give the defendant this opportunity, presumably by giving an instruction to that effect. Petry v. State, 524 N.E.2d 1293, 1300, n.7 (Ind. Ct. App. 1988). However, I.C. 35-37-4-6(f) only requires that the protected person be available for cross-examination at the hearing if the protected person is not to testify at the trial. Thus, it is best practice to call the protected person as a witness.

Poffenberger v. State, 580 N.E.2d 995 (Ind. Ct. App. 1991) (IAC because defense counsel did not call child for cross-examination at the admissibility hearing, thus losing possibility of raising serious questions of credibility or other grounds for exclusion).

(2) Purpose

The purpose of the pretrial hearing is to give the defendant the right, under circumstances less traumatic to the child than a trial, to inquire into the statement or ask the child questions about it. The goal of the statute is to reduce the child's emotional trauma caused by numerous court appearances, not to guarantee that the child will never have to face the defendant. The defendant has the right to an opportunity for a physical, immediate face-to-face confrontation. Beck v. State, 544 N.E.2d 204, 207-08 (Ind. Ct. App.1989).

(3) Combined competency hearing

The trial court has the discretion to combine competency hearing with hearing to determine admissibility of videotape. Rickey v. State, 661 N.E.2d 18 (Ind. Ct. App. 1996).

4. Requirements of admissibility

Protected person statute impinges upon ordinary evidentiary regime such that a trial court's responsibilities thereunder carry with them a special level of judicial responsibility. Carpenter v. State, 786 N.E.2d 696 (Ind. 2003).

The trial court's decision whether evidence is reliable enough to be admitted under the protected person statute will be reviewed for an abuse of discretion. A.R.M. v. State, 968 N.E.2d 820 (Ind. Ct. App. 2012).

a. Reliability

For the statement or videotape to be admissible under this statute, the trial court must find, in the hearing, "that the time, content and circumstances of the statement or videotape provide sufficient indications of reliability." I.C. 35-37-4-6(e).

PRACTICE POINTER: The reference in the statute to "sufficient indications of reliability" reflects the language of Idaho v. Wright, 110 S. Ct. 3139 1990), in which the U.S. Supreme Court stated that the Confrontation Clause would not be violated by the admission of evidence with sufficient "indicia of reliability" and "particularized guarantees of trustworthiness" based on "the totality of circumstances that surround the making of the statement [.]" Id. at 3149-50. After Crawford v. Washington, 124 S. Ct. 1354 (2004), where the hearsay statement is testimonial in nature, no "indicia of reliability" can substitute for the 6th Amendment right to cross-examination. *For more on the Sixth Amendment right to confrontation and the child hearsay statute,* see *Subsection 5, hereinafter, Constitutional Challenges.*

(1) Factors that cannot be considered

The reliability of an unavailable child's statement must be judged on its own merits and cannot be bolstered by corroborative proof. Pierce v. State, 677 N.E.2d 39, 45, n.9 (Ind.1997); Idaho v. Wright, 497 U.S. 805, 814, 110 S. Ct. 3139 (1990). Under the prior version of IC 35-37-4-6, there was a separate requirement of corroborative evidence independent of the requirement of indication of reliability. See, e.g., Miller v. State, 531 N.E.2d 466 (Ind. 1988). However, in 1993, the separate requirement of corroborative evidence was removed. Pierce v. State, 677 N.E.2d 39, 44 (Ind. 1997).

(2) Factors to be considered

Considerations in making the reliability determination under the statute include the following:

(1) The time and circumstances of the statement.
(2) Whether there was significant opportunity for coaching, the nature of the questioning.
(3) Whether there was a motive to fabricate.
(4) Use of age-appropriate terminology.
(5) Spontaneity and repetition.

Pierce v. State, 677 N.E.2d 39, 44 (Ind. 1997) (*citing* Idaho v. Wright, 497 U.S. 805, 821-22, 110 S. Ct. 3139 (1990)).

(6) The child's ability to observe, remember, recollect, and describe experience.
(7) The child's ability to understand the nature and consequences of an oath.

Poffenberger v. State, 580 N.E.2d 995, 998 (Ind. Ct. App. 1991).

(8) The general character of the declarant.
(9) Whether more than one person heard the statements.
(10) The relationship between the declarant and the witness.

Altmeyer v. State, 496 N.E.2d 1328, 1331, n.3 (Ind. Ct. App. 1986).

Arndt v. State, 642 N.E.2d 224 (Ind. 1994) (hearsay statements to parents by three-year-old were sufficiently reliable because: (1) the complaining witness had no motive to falsify, (2) the complaining witness made the statements during bath time while crying and in pain, (3) the witness used language appropriate for a three-year-old child, and (4) the witness repeated statements to more than one person he trusted).

(3) Factors casting doubt on reliability

Lengthy and stressful interviews or examinations preceding the statement may cast doubt on the reliability of the statement or videotape sufficient to preclude its admission. Pierce v. State, 677 N.E.2d 39, 44 (Ind. 1997) (*citing* Miller v. State, [Miller II] 531 N.E.2d 466, 470 (Ind. 1988)).

Miller v. State, 531 N.E.2d 466 (Ind. 1988) (it is difficult to imagine a more exhausting, stressful and coercive situation where a child witness was under intense control and scrutiny for several hours before a statement was made; she was subject to stressful physical examination, was confronted by a strange adult at the welfare department, then was taken to the sheriff's office where she was left by yet another stranger; when she did not concentrate on questions being asked, her parents were removed and she was confronted with two adults who, with difficulty, finally elicited answers sought and expected).

A long delay between alleged molestation and statements, and between multiple statements.

Carpenter v. State, 786 N.E.2d 696 (Ind. 2003) (hearsay testimony was unreliable because of the combination of following circumstances: 1) where it was not known the timing of the alleged molestation, there was no indication that complaining witness' statements were made close in time to alleged molestations; 2) statements themselves were not sufficiently close in time to each other to prevent implantation or cleansing; and 3) during competency hearing, the witness was unable to distinguish between truth and falsehood). See also Pierce v. State, 677 N.E.2d 39, 44 (Ind.1997).

Trujillo v. State, 806 N.E.2d 317 (Ind. Ct. App. 2004) (statement was sufficiently reliable when it was made in response to mother's non-leading questions about her daughter's day a few hours after alleged incident; videotape interview two days after incident was sufficiently reliable where no leading questions were used, and mother did not talk to daughter about incident between being told about

incident and interview). See also Taylor v. State, 841 N.E.2d 631 (Ind. Ct. App. 2006).

Ennik v. State, 40 N.E.3d 868 (Ind. Ct. App. 2015) (despite significant gap between the alleged molestation and C.W.'s initial disclosure to mother, trial court did not abuse its discretion in finding C.W.'s hearsay statements sufficiently reliable).

While the complaining witness's inability to understand nature and consequences of oath does not render statement inadmissible, it is significant negative factor. Miller v. State, 531 N.E.2d 466 (Ind. 1988). The inability bespeaks the lack of conscience and the absence of an understanding of duty. Also, age may indicate a major disability in observing, remembering, recollecting, and describing experiences. Miller v. State, 531 N.E.2d 466,470 (Ind. 1988).

b. Protected person cannot testify if testimony obtained via protected person statute is admitted at trial

In Tyler v. State, 903 N.E.2d 463 (Ind. 2009), the Indiana Supreme Court exercised its supervisory power to hold that a party may not introduce testimony via the protected person statute if the declarant testifies in open court as to the same matters, despite language to the contrary in the protected persons statute, Ind. Code 35-37-4-6. Under Evidence Rule 801(d)(1)(A) or (B), prior statements are only admissible if they are inconsistent with testimony or rebut a claim of fabrication. By allowing admission of statements which are not admissible under Evidence Rule 801, the protected persons statute permits admitting both a child's live testimony and consistent videotaped statements, creating cumulative evidence which can be unfairly prejudicial. Because this rule was implemented by use of the Court's supervisory power, the rule does not apply to proceedings conducted prior to publication of Tyler. Here, trial court did not err in admitting hearsay statements of the young victims under Indiana Rule of Evidence 403 and the law existing at that time.

But see Velasquez v. State, 944 N.E.2d 34 (Ind. Ct. App. 2011), *transfer denied, reinstated* 962 N.E.2d 637 (hearsay otherwise barred by Tyler is admissible even if child complaining witness testifies at trial; here, complaining witness's earlier statement to social worker that her stepfather molested her was admissible under the hearsay exception under Evidence Rule 803(4) as a statement for purpose of medical diagnosis or treatment; the witness was motivated to give truthful information and the content of the statement was such that an expert would rely on it in rendering diagnosis and treatment).

Shepherd v. State, 157 N.E.3d 1209, 1220 (Ind. Ct. App. 2020) (witness testified and was cross examined: "We cannot say that [D] was denied his right to cross-examine [C.W.]. when the trial court prevented him from showing the jury [C.W.'s] demeanor through publication of the video recordings of the interviews.").

Williams v. State, 170 N.E.3d 237 (Ind. Ct. App. 2021) (no abuse of discretion to admit a recorded out-of-court forensic interview of complaining witness who testified at trial but refused to talk about what defendant had done to her because she had already told

forensic interviewer and sexual assault nurse. Thus, C.W. did not testify live to the facts underlying the charges against Defendant, which eliminates the concern expressed in Tyler about repetition of testimony from a live witness and a videotaped statement).

(1) Protected person found unavailable

(a) Unavailable

Under IC 35-37-4-6(e)(2), there are three reasons why a declarant may be found unavailable as a witness: (1) from the testimony of a psychiatrist, physician, or psychologist, and other evidence, if any, the court finds that the protected person's testifying in the presence of the defendant will cause the protected person to suffer serious emotional distress such that the person cannot reasonably communicate, (2) the protected person cannot participate in the trial for medical reasons, or (3) the court has determined that the protected person is incapable of understanding the nature and obligation of an oath.

Norris v. State, 53 N.E.3d 512 (Ind. Ct. App. 2016) (in deciding whether to declare complaining witness unavailable to testify at defendant's trial, trial court did not err in considering additional testimony from a person who is not a psychiatrist, physician, or psychologist because Protected Person Statute allows court to consider "other evidence," which may include testimony from a person who is not an evaluation professional).

Vesa v. State, 119 N.E.3d 193 (Ind. Ct. App. 2019) (no error in admitting video-recorded child forensic interview when a licensed mental health professional reviewed and approved work of her unlicensed subordinate regarding child's emotional distress about testifying at trial).

A finding that the witness is unavailable because testifying at trial would cause the witness such emotional distress that her ability to communicate would be impaired must be supported by expert testimony. The court may arguably rely in part on its own observations, but by statute, must hear testimony from a psychiatrist, physician, or psychologist before making such a finding. Taylor v. State, 735 N.E.2d 308 (Ind. Ct. App. 2000).

Howard v. State, 853 N.E.2d 461 (Ind. 2006) (child was not unavailable when she became too emotional to testify despite encouragement from both parties and the trial court; because no psychologist or psychiatrist testified as required by I.C. 35-37-4-6, child's deposition should not have been admitted into evidence). See also Taylor v. State, 735 N.E.2d 308 (Ind. Ct. App. 2000).

Cox v. State, 937 N.E.2d 874 (Ind. Ct. App. 2010) (where complaining witness testified and was cross-examined, State could not substitute direct examination with previous videotaped statement; there was no evidence that complaining witness met the protected persons statute's standard for unavailability based on the potential for serious emotional distress that testifying might cause; this procedure constituted reversible error).

Although there is an older case, Guy v. State, 755 N.E.2d 248 (Ind. Ct. App. 2001), that allows a finding of unavailability of a child to be based on the child's refusal to testify due to being emotional at trial for purposes of admission of a deposition under Indiana Rule of Evidence 804, Howard, *supra,* makes clear that such court findings do not satisfy Confrontation Clause concerns or statutory requirements. Id. at 467-68 n. 4

Unavailability based on a finding that the protected person is legally incompetent may be predicated only upon doctors' certifications or a court's determination. Miller v. State, [Miller II] 531 N.E.2d 466, 469 (Ind. 1988).

(b) Required prior opportunity to cross-examine

If a protected person is unavailable to testify at the trial for a reason listed above, a statement or videotape may be admitted in evidence only if the protected person was available for cross-examination: (1) at the hearing described in subsection (e)(1); or (2) when the statement or videotape was made. I.C. 35-37-4-6(f).

Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005) (defendant's opportunity to cross-examine the complaining witness at the protected persons hearing satisfied statutory cross-examination requirement even though she was found incompetent to testify at trial and her testimony at hearing was not coherent; however, the cross did not satisfy the constitutional requirement). See also Purvis v. State, 839 N.E.2d 572 (Ind. Ct. App. 2005) and Shoda v. State, 132 N.E.3d 454 (Ind. Ct. App. 2019).

D.G.B. v. State, 833 N.E.2d 519 (Ind. Ct. App. 2005) (defendant did not have an opportunity to cross-examine the complaining witness under the I.C. 35-37-4-6(f) where the witness would not take the oath, turned away from the judge and put her hands over her ears during questioning).

Poffenberger v. State, 580 N.E.2d 995 (Ind. Ct. App. 1991) (IAC because defense counsel did not call child for cross-examination at the admissibility hearing, thus losing possibility of raising serious questions of credibility or other grounds for exclusion).

Rickey v. State, 661 N.E.2d 18 (Ind. Ct. App. 1996) (although defense counsel may not have elicited "the most illuminating" responses from complaining witness, who only nodded in response to questions and refused to verbally answer whether she knew the difference between the truth and a lie, the defendant was not denied his right to confront and cross-examine witness).

Be warned that failure to take the opportunity to cross-examine the protected person at the hearing is a waiver of the opportunity to cross-examine. See I.C. 35-37-4-6(f) (requiring the witness to be *available* for cross); Pierce v. State, 677 N.E.2d 39, 48 (Ind. 1997). However, it is unclear whether failing to call the

protected person when the State does not constitute a waiver of the right to cross-examine. Petry v. State, 524 N.E.2d 1293, 1300, n.7 (Ind. Ct. App. 1988).

5. Constitutional challenges

The Indiana Supreme Court has held that the statute does not unduly inhibit the defendant's right of cross-examination and provides adequate safeguards to protect against the admission of unreliable hearsay. The statute is not unconstitutional per se under either the Sixth Amendment or Article 1, Section 13 of the Indiana Constitution. Miller v. State, [Miller I] 517 N.E.2d 64, 72 (Ind. 1987); Perryman v. State, 80 N.E.3d 234 (Ind. Ct. App. 2017).

a. Sixth Amendment

The Confrontation Clause of the Sixth Amendment bars the admission of *testimonial* hearsay against a criminal defendant who has not had the opportunity to cross-examine the declarant, either at trial or beforehand. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).

PRACTICE POINTER: The Indiana Supreme Court, in Miller v. State, [Miller I] 517 N.E.2d 64, 69-73 (Ind.1987), held that Indiana's protected person statute was not facially unconstitutional. However, Miller relied in part on Ohio v. Roberts, a case expressly overturned by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004). Crawford discarded the Ohio v. Roberts rule that 'other indicia of reliability' could substitute for cross-examination of testimonial statements. The U.S. Supreme Court's rejection of the Ohio v. Roberts rule in Crawford may cast some doubt on the constitutionality of other judicial 'reliability' assessments. While Indiana's Protected Person statute literally provides for cross-examination, see IC 35-37-4-6(e),(f), IC 35-37-4-8(h), it also allows the trial court to make a judicial finding of 'reliability', and based on that finding, to substitute an out-of-court statement and out-of-court cross-examination for live testimony and cross-examination in the presence of the fact finder. Cf. Perryman v. State, 80 N.E.3d 234 (Ind. Ct. App. 2017) (protected person statute does not violate Crawford by requiring trial judges to determine the reliability of the protected person's statement in addition to confrontation).

(1) Unavailable

A child witness is unavailable for purposes of the Confrontation Clause if the requirements set forth in the protected persons statute are met. Howard v. State, 853 N.E.2d 461 (Ind. 2006). Thus, even when a child's testimonial hearsay statement, such as a deposition, is admissible under the Rules of Evidence, admission of the hearsay statement will violate the Sixth Amendment if the trial court does not follow the unavailability requirements set forth in the protected persons statute. Id. at 467-68 n. 4 (implicitly overruling Guy v. State, 755 N.E.2d 248 (Ind. Ct. App. 2001)). Where child testifies at trial, the admission of a prior testimonial statement does not violate the Sixth Amendment right to confrontation. Agilera v. State, 862 N.E.2d 298 (Ind. Ct. App. 2007).

(2) Testimonial

A guidepost for determining whether hearsay is testimonial is whether an objective witness would reasonably believe that the statement would be available for use at a

later trial. Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005) (*citing* Crawford v. Washington, 541 U.S. at 52).

Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005) (complaining witness's out-of-court statements to her great-grandmother were admissible under Indiana's Protected Person statute and under the Sixth Amendment being they were non-testimonial, but statements she made to a detective and caseworker were "testimonial" and not admissible).

Purvis v. State, 829 N.E.2d 572 (Ind. Ct. App. 2005) (fact that parents suspected illegal activity on the defendant's part when they spoke to child and then contacted police after getting information did not make statements to parents testimonial).

(3) Prior opportunity to cross-examine

Testimonial hearsay statements of an unavailable witness are admissible under the Sixth Amendment only if the defendant had a prior opportunity to cross-examine the witness. Crawford v. Washington, 541 U.S. 36 (2004). However, Crawford demands a higher standard of cross-examination for out-of-court testimonial statements than non-testimonial statements because testimonial statements implicate to a greater extent confrontation concerns. Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005) (*citing* Purvis v. State, 829 N.E.2d 572, 583-84 (Ind. Ct. App. 2005)).

Anderson v. State, 833 N.E.2d 119 (Ind. Ct. App. 2005) (although the defendant was allowed to cross-examine the complaining witness at the hearing, thus satisfying I.C. 35-37-4-6(f), the complaining witness' testimony did not constitute cross-examination for Crawford purposes because the witness was incapable of understanding the nature and obligation of an oath making her unavailable as a witness for trial; a witness unable to appreciate obligation to testify truthfully cannot be effectively cross-examined for Crawford purposes). See also Purvis v. State, 829 N.E.2d 572, 583-84 (Ind. Ct. App. 2005).

D.G.B. v. State, 833 N.E.2d 519 (Ind. Ct. App. 2005) (where the witness would not take the oath, turned away from the judge and put her hands over her ears during questioning at the protected persons hearing, the defendant did not have a prior opportunity to cross-examine the witness).

Howard v. State, 853 N.E.2d 461 (Ind. 2006) (the defendant had a full, fair, and adequate opportunity to confront and cross-examine the child witness, within the meaning of the Sixth Amendment, when her pre-trial deposition was taken regardless that the deposition was for discovery purposes).

Perryman v. State, 80 N.E.3d 234 (Ind. Ct. App. 2017) (Sixth Amendment did not require the opportunity to cross-examine C.W.'s testimonial statements at the time they were made because no prosecution had commenced and defendant was not an accused; and even if confrontation rights have attached at the time a testimonial statement is made, the Sixth Amendment does not require opportunity to cross-examine at that time. Defendant in this case was not denied

the opportunity for full, adequate, and effective cross-examination, and he was able to fully probe whether motive or opportunity for manipulation or fabrication existed).

b. Article 1, Section 13 of the Indiana Constitution

Admitting otherwise inadmissible evidence under the statute must be accompanied by some opportunity for cross-examination if it is to comply with the Indiana Constitution. Exercise of the confrontation right outside the presence of the jury could satisfy the opportunity for confrontation required by the state constitutional right to meet the witnesses face to face under Art. 1, Sec.13 of the Indiana Constitution. Hearsay exceptions must be "separately tested" for a violation of the Indiana confrontation right. Pierce v. State, 677 N.E.2d 39, 48-49 (Ind. 1997).

The Indiana constitutional right to confrontation is greater than the Sixth Amendment constitutional right. Article Section 13 of the Indiana Constitution provides that "in all criminal prosecutions, the accused shall have the right . . . to meet the witnesses face to face." Brady v. State, 575 N.E.2d 981, 985 (Ind. 1991). The Indiana Constitution protects two separate rights: (1) the right to cross-examination, generally performed by the defendant's attorney, and (2) the right to physical confrontation (by the defendant). Brady v. State, 575 N.E.2d at 988. By confronting an accuser face-to-face, the confrontation may "confound and undo the false accuser, or reveal the child coached by a malevolent adult." Brady, 575 N.E.2d at 988.

6. Use at trial

a. Jury instruction

If a statement or videotape is admitted in evidence under this section, the court must instruct the jury that it is for the jury to determine the weight and credit to be given the statement or videotape and that, in making that determination, the jury shall consider the following: (1) The mental and physical age of the person making the statement or videotape. (2) The nature of the statement or videotape. (3) The circumstances under which the statement or videotape was made and (4) Other relevant factors. I.C. 35-37-4-6(h).

b. Transcript or videotape of hearing

If a statement or videotape described in subsection (d) is admitted into evidence under this section, a defendant may introduce a: (1) transcript; or (2) videotape; of the [protected persons'] hearing held under subsection (e)(1) into evidence at trial. I.C. 35-37-4-6(i).

7. Alternative: Closed-circuit testimony and pretrial videotaping: I.C. 35-37-4-8

IC 35-37-4-8 provides a procedure for "in court" testimony of an available declarant through use of a videotape or closed-circuit television. The videotaped statements or the closed-circuit statements contemplated by IC 35-37-4-8 are subject to the full panoply of trial protections accorded a defendant because the statements are actually made in a court setting.

Before closed circuit television or a videotape can be substituted for in-court testimony, the State must prove that the declarant meets the requirements of I.C. 35-37-4-8(e).

In determining under IC 35-37-4-8(e)(1)(B)(i) whether it is more likely than not that the protected person will suffer "extreme stress" and be unable to reasonably communicate in the defendant's physical presence, the trial court may consider the testimony of a psychiatrist "and any other evidence." Harris v. State, 964 N.E.2d 920 (Ind. Ct. App. 2012).

State v. McKinney, 82 N.E.3d 290 (Ind. Ct. App. 2017) (State's evidence showed child would be emotionally harmed more by testifying in open court than via closed-circuit TV).

When the State fails to give the required ten days advance notice of intent to use closed circuit testimony at trial, it is within the trial court's discretion to permit it, unless the defendant shows that he is prejudiced by lack of timely notice. Broude v. State, 956 N.E.2d 130 (Ind. Ct. App. 2011) (two-week continuance to permit further plea negotiations remedied the problem).

a. Closed-circuit testimony

The main goal of the statute, reducing the trauma caused by in-court testimony before the accused, is achieved in large measure without compromising appellant's constitutional right to meet the witnesses face to face. Brady v. State, 575 N.E.2d 981, 988 (Ind. 1991).

PRACTICE POINTER: Sample jury instruction
In this case, members of the jury, the child witness was allowed to testify (in another room via closed-circuit television/on videotape). We do this with young children so that they are not distracted by the formality of a courtroom or unreasonably frightened. Such a procedure is used for children regardless of whether they were in fact victims of a crime. You must judge the testimony of the child witness exactly the same as that of any other person, and precisely as if the child witness had testified here in court.

See, Morosco, *The Prosecution and Defense of Sex Crimes,* Sec. 908(3) at 9-91, 92 (1992).

b. Taping of testimony before trial

IC 35-37-4-8(d) authorizes testimony to be taken before trial and videotaped for use at trial. This procedure does not offend the Indiana constitutional face-to-face requirement. Hart v. State, 578 N.E.2d 336, 337, n.1 (Ind.1991). However, the child and the defendant must be able to see and hear each other to be constitutional under the Indiana Constitution. Brady v. State, 575 N.E.2d 981 (Ind. 1991).

The defendant's cross examination at the protected persons hearing can be taped and later shown to the jury along with a videotape or other statement admitted under the Protected Persons statute. Pierce v. State, 677 N.E.2d 39, 50 (Ind. 1997).

c. No shielding of defendant

Confrontation clause in both the United States and Indiana Constitution's guarantee the defendant both the right to confront a witness face to face and the right to cross examine a witness. Casada v. State, 544 N.E.2d 189 (Ind. Ct. App 1989) (*citing* Coy v. Iowa, 108 S. Ct. 2798, 101 L.Ed.2d 857 (1988) and Miller v. State, 574 N.E.2d 64 (Ind. 1987)).

Brady v. State, 575 N.E.2d 981 (Ind. 1991) (admission of tape was fundamental error where child was unable to see or hear defendant and unaware of his presence during taped statement).

Casada v. State, 544 N.E.2d 189 (Ind. Ct. App 1989) (trial court's finding that the complaining witness was too distraught to testify and that it hoped that chalkboard screen would enable her to do so was not a sufficient particularized finding to outweigh the defendant's right to confront cross examine face to face; thus, reversible error to allow witness to partially testify behind screen).

Casselman v. State, 582 N.E.2d 432 (Ind. Ct. App. 1991) (because Indiana's videotape testimony statute, IC 35-37-4-6, provides for two face-to-face encounters, it is not constitutionally invalid).

Hart v. State, 578 N.E.2d 336 (Ind. 1991) (admission of pretrial videotape of child witness' testimony where defendant was in another room and could only hear the testimony violated his right to face-to-face confrontation but was not fundamental error).

IV. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE - RULE 804

A. OFFICIAL TEXT:

(a) **Criteria for Being Unavailable**. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (5); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

(1) *Former Testimony*. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had - or, in a civil case, whose predecessor in interest had - an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement Under the Belief of Imminent Death*. A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement Against Interest*. A statement that that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability.

A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.

(4) *Statement of Personal or Family History*. A statement about:

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability*.

A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying.

B. ADMITTING HEARSAY WHEN THE DECLARANT IS UNAVAILABLE

1. U.S. Confrontation Clause - Sixth Amendment

The Confrontation Clause of the Sixth Amendment to the U.S. Constitution does not bar the use of every out-of-court statement by an unavailable declarant. However, the Confrontation Clause does bar the admission of some evidence that would otherwise be admissible under an exception to the hearsay rule. Idaho v. Wright, 497 U.S. 805, 814, 110 S. Ct. 3139 (1990); Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999).

Testimonial hearsay may not be admitted against a criminal defendant who has not had the opportunity to confront and cross-examine the declarant, regardless of whether other indicia of reliability exist. Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

For a detailed analysis of the Confrontation Clause as applied to unavailable witnesses, see this Chapter, Rule 802.

2. Indiana's Confrontation Clause - "face to face"

The Indiana Constitution, Article 1, Section 13, guarantees the accused the right to meet his accuser "face to face," language which is not found in the Federal Constitution. The face-to-face element requires that the witness and the accused be able to see and recognize each other. The Indiana Constitution also guarantees the right to cross-examination. Pierce v. State, 677 N.E.2d 39, 49 (Ind. 1997); Brady v. State, 575 N.E.2d 981 (Ind. 1991). Exceptions to the hearsay rule are not automatically consistent with the State constitutional right to meet the witnesses face to face but must be separately tested. Arndt v. State, 642 N.E.2d 224, 228 (Ind. 1994).

For a detailed analysis of Indiana's constitutional right to confront face-to-face and cross-examine, see this Chapter, Rule 802.

C. PROVING UNAVAILABILITY

1. Whose burden to prove unavailability?

a. Under Rules of Evidence

The proponent of the hearsay must establish the evidentiary foundation Stidham v. Whelchel, 698 N.E.2d 1152, 1156 (Ind. 1998) (*citing* Miller, 13 *Indiana Evidence,* 707 § 804.100 (2d ed.)); see, e.g., Reemer v. State, 835 N.E.2d 1005 (Ind. 2005) (self-authentication rules relieve this burden in certain situations); Bailey v. State, 806 N.E.2d 329 (Ind. Ct. App. 2004) (business record exception).

b. Confrontation Clause

To satisfy the unavailability requirement, the prosecution must have made a "good faith effort" to secure the witness' presence. Barber v. Page, 390 U.S. 719, 88 S. Ct. 1318 (1968); Jackson v. State, 735 N.E.2d 1146 (Ind. 2000). The Supreme Court has "imposed a heavy burden on the prosecution either to secure the presence of the witness or to demonstrate the impossibility of that endeavor. Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980), *overruled on other grounds*, Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

Contrary the U.S. Supreme Court's ruling in Barber, *supra*., for the first time, the Indiana Supreme Court placed the burden on the defendant to prove unavailability by attempting to procure the presence of the witness. Fowler v. State, 829 N.E.2d 459 (Ind. 2005). The defendant must take all necessary steps to procure the State's witness. Fowler v. State, 829 N.E.2d 459 (Ind. 2005). The defendant must subpoena the State's witness, and if the State's witness is present but will not answer questions, the defendant must request the court to compel the State's witness's testimony prior to the witness being declared unavailable for Crawford purposes. Id.

Although the Fowler court acknowledges that Crawford did nothing to alter the principles governing declarants who are available for cross-examination at trial, the Fowler court overrules, without any explanation, the long-standing rule that, under the Confrontation Clause, the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant. Jackson v. State, 735 N.E.2d 1146 (Ind. 2000); Garner v. State, 777 N.E.2d 721 (Ind. 2002). Further, at least two other States have held against the burden- shifting approach taken by the Indiana Supreme Court. State v. Cox, 876 So.2d 932 (La. Ct. App. 2004); Bratton v. State, 156 S.W.3d 689 (Tex. App. 2005).

2. Privilege

Privileged information does not cease to be privileged merely because it is subject to a Rule 804 hearsay exception. Mayberry v. State, 670 N.E.2d 1262, 1266-67 (Ind. 1996) (*citing Ind. Professional Conduct Rule* 1.6.).

Thomas v. State, 656 N.E.2d 819, 823 (Ind. Ct. App. 1995) (after the patient impliedly waived the physician-patient privilege, the physician's testimony about her statements was admissible under Rule 803(4)).

A witness who invokes the Fifth Amendment privilege against self- incrimination is unavailable for purposes of the rule. Kellems v. State, 651 N.E.2d 326, 328 (Ind. Ct. App. 1995). And a defendant exercising her Fifth Amendment right not to testify at trial meets the criteria for unavailability. Webb v. State, 149 N.E.3d 1234, 1239 (Ind. Ct. App. 2020).

United States v. Gary, 74 F.3d 304 (1st Cir. 1996) (witness who had testified at first trial was unavailable, for purposes of the rule, when he indicated at retrial that he would testify for defense on direct examination but would invoke his privilege against self-incrimination on cross examination), *cert. den.*

3. Refusal to testify despite court order

A witness' refusal to testify renders him unavailable for purposes of using his prior testimony. Griffin v. State, 692 N.E.2d 468 (Ind. Ct. App. 1998), *reh'g*, 694 N.E.2d 304. Unavailability can be established when the witness persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so. Ajabu v. State, 693 N.E.2d 921 (Ind. 1998). Despite the Supreme Court's holding that to satisfy unavailability requirement, prosecution must have made "good faith effort" to secure witness' presence, in Indiana, the burden is on the defendant to procure the testimony. Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318 (1968); cf. Fowler v. State, 829 N.E.2d 459 (Ind. 2005).

Fowler v. State, 829 N.E.2d 459 (Ind. 2005) (a State witness who is present and takes the stand, but then refuses to testify with no valid claim of privilege, is not unavailable if the defense does not make an effort to compel the State's witness' testimony; the witness does not become unavailable until the court orders the witness to answer and the refusal persists).

Howard v. State, 853 N.E.2d 461 (Ind. 2006) (unlike adult witness, I.C. 35-37-4-6 places the burden on the State to prove the unavailability of a child; child was not unavailable when she became too emotional to testify despite encouragement from both parties and the trial court; because no psychologist or psychiatrist testified as required by I.C. 35-37-4-6, child's deposition should not have been admitted into evidence).

PRACTICE POINTER: Although Guy v. State, 755 N.E.2d 248 (Ind. Ct. App. 2001), allowed a finding of unavailability of a child to be based on the child's refusal to testify due to being emotional at trial for purposes of admission of a deposition under Indiana Rule of Evidence 804, Howard, *supra,* makes clear that such court findings do not satisfy Confrontation Clause concerns or statutory requirements. Id. at 467-68 n. 4 See also Taylor v. State, 735 N.E.2d 308 (Ind. Ct. App. 2000).

But see:

Gillie v. State, 512 N.E.2d 145 (Ind. 1987) (prosecution's promise to reimburse witness for travel expense secured promise to appear; however, when witness telephoned one

week later and simply said he couldn't afford the trip, and no further steps were taken, the trial court erred in finding witness unavailable and admitting former testimony).

Jackson v. State, 735 N.E.2d 1146 (Ind. 2000) (where officer was out of town at a secret service training session, but State made no effort to obtain officer's attendance, good faith or otherwise, the State did not show he was unavailable for purposes of the Sixth Amendment).

Garner v. State, 777 N.E.2d 721 (Ind. 2002) (mere vacation is not sufficient to circumvent the defendant's right to confrontation).

Becker v. State, 695 N.E.2d 968, 973 (Ind. Ct. App. 1998) (the Confrontation Clause may require the prosecutor to seek the issuance of a subpoena to establish unavailability; however, use of taped deposition of doctor who moved to North Carolina was proper under Indiana Rule of Evidence 804 and did not violate the Confrontation Clause).

PRACTICE POINTER: The Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings enables prosecuting authorities in one State to obtain an order from a court in another State compelling the witness' appearance to testify in court in the first State. Indiana's adoption of the Act is at I.C. 35-37-5.

4. Claim of lack of memory

Although Indiana Rule of Evidence 804(a)(3) claims that a lack of memory as to a subject matter of a prior statements makes the declarant unavailable, lack of memory as to even making the statement may make the declarant unavailable for cross-examination purposes and thus, a violation the Sixth Amendment.

a. Lack of memory as to making the prior statement

Before a prior statement may be used as substantive evidence, under Indiana and federal case law, the witness must acknowledge making the prior statement. Because a witness who does not have memory of having a conversation cannot be crossed, a prior statement may not be used as substantive evidence if the declarant (1) denies making the statement or (2) denies memory of making the statement. See, e.g., Brown v. State, 671 N.E.2d 401, 406-07 (Ind. 1996).

But see Robinson v. State, 682 N.E.2d 806 (Ind. Ct. App. 1997) (trial court properly allowed witness' prior identification of the defendant to be admitted despite the fact that the defendant denied making the prior identification; court analyzed statement under Indiana Rule of Evidence 801 and not Sixth Amendment).

b. Lack of memory as to subject matter of the prior statement

The declarant's memory loss does not make her unavailable for cross-examination for Confrontation Clause purposes. The effect produced by declarant's assertion of memory loss was often the very result sought to be elicited on cross examination and could be effective in destroying the force of the prior statement, so admission of the statement did

not deny the right to confrontation. Brim v. State, 624 N.E.2d 27 (Ind. Ct. App. 1993). Since the ability to inquire into a witness's bias, lack of care and attentiveness, his poor eyesight and bad memory are sufficient to establish the constitutionally requisite opportunity for cross-examination when a witness testifies to his current belief, it should also suffice when the witness' past belief is introduced and he is unable to recall the reason for that belief. U.S. v. Owens, 484 U.S. 554, 558, 108 S. Ct. 838 (1988).

> U.S. v. Owens, 484 U.S. 554, 558, 108 S. Ct. 838 (1988) (statement identifying the defendant made by declarant during a lucid moment of his recovery from a beating to the head did not violate the Confrontation Clause, despite the fact that he could not testify at trial to the basis of the identification, because the declarant testified under oath at the trial, was subject to cross-examination, and the jury was able to observe his demeanor).

However, the Supreme Court has recognized that when the witness disclaims all present knowledge of the event which was the subject of a prior inconsistent statement, opportunities for testing the prior statement through cross-examination at trial may be significantly diminished. California v. Green, 399 U.S. 149, 90 S. Ct. 1930 (1970).

5. Witness's death or illness

The law does not require the doing of a futile act. If no possibility of procuring the witness exists (as, for example, the witness's intervening death), then the prosecutor is not required to make any other showing. But if there is a possibility, however remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. The length to which the prosecution must go to produce a witness is a question of reasonableness. Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980), *overruled on other grounds,* Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).

> Price v. State, 591 N.E.2d 1027 (Ind. 1992) (victim unavailable to testify due to post-traumatic stress disorder and amnesia as result of shooting).
>
> Berkman v. State, 976 N.E.2d 68 (Ind. Ct. App. 2012) (trial court questioned witness directly about her illness and recent hospitalization; finding her unavailable as a witness was not an abuse of discretion).
>
> Burns v. State, 91 N.E.3d 635 (Ind. Ct. App. 2018) (no error in admitting video-recorded deposition from witness had moved to Florida and been diagnosed with brain cancer before trial).

a. Foundation

> Moore v. State, 485 N.E.2d 62 (Ind. 1985) (a properly certified death certificate correctly listing the witness's address is sufficient to find unavailability).

b. Jury should not be told why witness is unavailable

The jury normally should not be told why the witness is unavailable. Where unavailability is result of declarant's death, it is error to inform the jury why the witness

is unavailable. Moore v. State, 440 N.E.2d 1092 (Ind. 1982), *appeal after remand*, 467 N.E.2d 720 (Ind. 1984).

6. Unavailability cannot be caused by proponent's wrongdoing for purpose of preventing witness from testifying

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying. Ind. Evidence Rule 804(a) (2009 amendment); *accord*, Ind. Trial Rule 32(A)(3); I.C. 35-37-4-3.

See Giles v. California, 128 S. Ct. 2678 (2008) (under doctrine of "forfeiture by wrongdoing" where witness is unavailable because of defendant's act, such as murdering the witness, defendant forfeits right to challenge admissibility of hearsay of unavailable witness *only if* the State establishes that defendant's motive and purpose for the act was to prevent the witness from testifying); see also Boyd v. State, 866 N.E.2d 855, 856-57 (Ind. Ct. App. 2007).

Cf. Morgan v. State, 903 N.E.2d 1010 (Ind. Ct. App. 2009), *trans. denied* (witness should not be considered unavailable because State was arguably negligent in monitoring location of witness; defendant did not establish that State's failure to monitor witness more closely was for purpose of preventing witness from testifying).

The 2009 amendment to Ind. Evidence Rule 804(a) contradicts Roberts v. State, 894 N.E.2d 1018 (Ind. Ct. App. 2008), *trans. denied*, which held that a defendant forfeited his right to raise a Sixth Amendment challenge to hearsay of an unavailable witness even where there is no evidence that the defendant committed the act with the specific purpose and motive of preventing the witness from testifying at trial. See Giles, 128 S. Ct. 2678 (2008) (Breyer, J. dissenting). The amendment also calls into question Lowery v. State, 478 N.E.2d 1214 (Ind. 1985), *cert. denied* (hearsay is inadmissible where witness's absence is caused by the party offering the evidence).

See also:

United States v. Rothbart, 653 F.2d 462 (10th Cir. 1981), *aff'd* 723 F.2d 752 (1983) (hearsay inadmissible where unavailability procured by the government, where the government cleared existing obstacles to witness's journey outside jurisdiction of court by taking his deposition and releasing him from subpoena).

United States v. Puckett, 692 F.2d 663 (10th Cir. 1982), *cert. den.*, 459 U.S. 1091 (1982) (hearsay inadmissible where inability to procure attendance of witness was attributable to attorney's tardiness in failing to attempt to subpoena witnesses until near the end of second week of trial).

United States v. Kimball, 15 F.3d 54 (5th Cir. 1994), *cert. den.,* 513 U.S. 999 (1994) (defendant could not introduce exculpatory testimony he gave at first trial where he invoked his Fifth Amendment privilege not to testify at a retrial on charges of firearms possession; proponent of former testimony may not create the condition of unavailability and then benefit therefrom).

Edwards v. State, 862 N.E.2d 1254 (Ind. Ct. App. 2007) (the parties were collaterally estopped from relitigating forfeiture due to Court of Appeals' holding in an unpublished opinion between the same two parties that the defendant did not forfeit his confrontation right by alleging murdering the unavailable witness).

Scott v. State, 139 N.E.3d 1148 (Ind. Ct. App. 2020) (the State proved by a preponderance of the evidence that defendant's conduct in repeatedly urging C.W. to change her story and not appear for depositions or trial was designed, at least in part, to keep her from testifying against him; defendant's wrongdoing forfeited his right to confront C.W.'s statements to police officers and his Sixth Amendment right to confrontation was not violated by their admission).

Smoots v. State, 172 N.E.3d 1279 (Ind. Ct. App. 2021) (State proved by preponderance of evidence that defendant's conduct in ordering two others to contact and make threats to witness to dissuade him from testifying was designed to procure witness's absence from trial and prevent him from testifying against him; thus, defendant forfeited Sixth Amendment right to confrontation in light of his wrongdoing).

U.S. v. Foster, 128 F.3d 949 (6th Cir. 1997) (where defense learned four days before trial that grand jury witness had testified that defendant "had nothing to do with selling drugs," and where immediate attempt to subpoena witness was unsuccessful, defense should have been allowed to offer grand jury testimony at trial pursuant to Fed. R. Ev. 804(b)(1); delay in subpoenaing witness was not fault of defense and should not prevent finding that witness was unavailable).

D. HEARSAY EXCEPTIONS

1. Former testimony - Rule 804(b)(1)

"Testimony that: (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and (B) is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination" is not excluded by the hearsay rule if the declarant is unavailable as a witness. Indiana Rule of Evidence 804(b)(1).

Berkman v. State, 976 N.E.2d 68 (Ind. Ct. App. 2012) (motive for discovery deposition is similar enough to that driving a defendant's cross-examination at trial to satisfy Ind. Evid. R. 804(b)(1)).

a. Rationale

The exception arises from necessity and has been justified on the ground that the right of cross-examination initially afforded provides substantial compliance with the purposes behind the confrontation requirement. Barber v. Page, 390 U.S. 719, 722, 88 S. Ct. 1318, (1968). The Confrontation Clause does not prohibit use of the prior testimony of an unavailable witness, California v. Green, 399 U.S. 149, 165, 90 S. Ct. 1930 (1970), unless the defendant has not had the opportunity to cross-examine the witness previously. Crawford v. Washington, 541 U.S. 16, 124 S.Ct. 1354, (2004).

Former testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence. If the declarant is unavailable, no "better" version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point. U.S. v. Inad, 475 U.S. 387, 394-95, 106 S.Ct. 1121 (1986).

b. Foundation

(1) Unavailability

For a detailed analysis of the unavailability requirement, see section IV.C, *supra,* concerning Rule 804 of this Chapter.

(2) Prior cross-examination with similar motive to develop testimony

(a) Opportunity to cross

Williams v. State, 685 N.E.2d 730 (Ind. Ct. App. 1997) (during the period the defendant is found to be incompetent to stand trial, the State cannot take a deposition of witness to be used in lieu of testimony at trial; although the defendant was present at deposition, he could not assist his counsel in effectively cross-examining victim because the defendant did not understand nature of charges against him).

Rhea v. State, 814 N.E.2d 1031 (Ind. Ct. App. 2004) (trial court abused its discretion in allowing testimony from first trial of witness who refused to testify in second trial; because the defendant was improperly prohibited from crossing the witness in the first trial on the penalties he could have received before an agreement, the defendant did not have a sufficient opportunity to cross; the fact that the trial court told the jury about the penalties did not remedy the harm).

Hughley v. State, 737 N.E.2d 420 (Ind. Ct. App. 2000) (trial court did not abuse its discretion in admitting testimony of witness from former trial, when witness refused to testify in second trial; fact that defense counsel decided not to conduct more thorough questioning of witness at first trial was matter of inclination, not opportunity).

Brittain v. State, 68 N.E.3d 611 (Ind. Ct. App. 2017) (where defendant was afforded the opportunity to and did cross examine State's witness at two-hour deposition, admission of redacted version of deposition at trial did not violate defendant's state or federal confrontation rights; witness died after counsel deposed her, thus she was "unavailable" as a witness for trial under Rule 804).

(b) Motive to cross

There must have been a similar motive to develop the testimony on the part of the non-offering party. The motive need not be identical. A change in the theory of a case is not what constitutes a change in motive. The issues in the litigation must be so dissimilar in the two procedural settings that the nature of the cross-examination in the first would not have achieved the goals of cross-examination for the second. Moore v. State, 467 N.E.2d 720, 724 (Ind. 1984).

Berkman v. State, 976 N.E.2d 68, 78 (Ind. Ct. App. 2012) (a criminal defense attorney conducting a discovery deposition generally has the same motive to learn how the deponent's credibility might be attacked).

Griffin v. State, 692 N.E.2d 468, 472 (Ind. Ct. App.1998), *aff'd on reh'g,* 694 N.E.2d 304 (Ind. Ct. App.1998) (defendant, acquitted of felony murder in first trial, was retried on robbery and conspiracy charges; the defendant cross-examined witness "thoroughly" at the first trial; motive for cross-examination in the first trial was similar, if not identical, to his motive in the second trial: present the best possible defense to the criminal charges against him).

Moore v. State, 485 N.E.2d 62 (Ind. 1985) (at the time of the motion to suppress hearing, defendant was charged with one count of robbery against witness; by the time of trial three, additional counts of robbery were added for same incident; witness's testimony from hearing on motion to suppress was admissible as long as testimony was restricted to acts committed against witness, and witness was unavailable at trial; defendant had the right and the same motive to cross-examine the witness at the motion to suppress).

Howard v. State, 853 N.E.2d 461 (Ind. 2006) (even a deposition taken for discovery purposes provides the defendant with a full, fair and adequate opportunity to confront and cross-examine a witness within the meaning of the Sixth Amendment).

United States v. Powell, 894 F.2d 895, 901 (7th Cir. 1990), *cert. den.* (prosecution's motive at guilty plea hearing is to assure that the plea is voluntary and that a factual basis exists for it; prosecutor's motive to examine defendant at hearing was not similar to motive to examine same person if offered as trial witness)**.**

U.S. v. Foster, 128 F.3d 949 (6th Cir. 1997) (Government's motive and opportunity at grand jury proceedings to develop and disprove witness's testimony were similar to those it would have had at trial).

PRACTICE POINTER: The easiest way to determine whether motives are similar is to look at the issues and the context in which the opportunity for examination previously arose and compare that to the issues and context in which the testimony is currently offered. Whether the adverse party had a similar motive to develop the testimony is a factual question for the court.

(c) Waiver of opportunity

Walker v. State, 607 N.E.2d 391 (Ind. 1993) (use of deposition which defendant did not attend did not violate defendant's sixth amendment right to confront; defendant waived his opportunity to be present).

Owings v. State, 622 N.E.2d 948 (Ind. 1993) (admission at trial of deposition which defendant was not permitted to attend, taken by State and given by witness unavailable for trial, results in the defendant never having opportunity to confront that witness; such procedure may violate the defendant's right to confrontation; however, here, where defendant did not object to the deposition without him, there was a waiver of his Sixth Amendment right).

Mathews v. State, 26 N.E.3d 130, 135-36 (Ind. Ct. App. 2015) (where there is no showing in the record that defendant is unable to attend a deposition and he makes no objection to it proceeding, defendant waives his right to confrontation even if the witness is unable to testify at trial; where, however, neither the defendant nor his attorney was given notice of the taking of a statement, no waiver has occurred).

c. Depositions

Although even discovery depositions may be admissible into evidence when a witness is unavailable, the deposition still must meet the requirements of Indiana Trial Rule 32. A party offering a deposition into evidence bears the burden of establishing its admissibility. The fact that a statement may be admissible under Rule 804(b) does not cure its failure to comport with T.R. 32. L.K.I. Holdings, Inc. v. Tyner, et al, 658 N.E.2d 111, 116-17 (Ind. Ct. App. 1995).

2. Statement under belief of imminent death - Rule 804(b)(2)

"A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances" is admissible when the declarant is unavailable. Indiana Rule of Evidence 804(b)(2).

IRE 804(B)(2), dying declaration hearsay exception, is broader than pre-existing Indiana common law. First, the rule applies in all cases, not just homicide prosecutions. Second, the declarant need not be dead as condition of admissibility. The Rule only requires that declarant be unavailable witness under IRE 804(a). See Miller, *Indiana Practice*, § 804.202.

Crawford v. Washington, 124 S. Ct. 1354 (2004) neither explicitly nor implicitly signaled that dying declaration exception to hearsay rule ran afoul of an accused's right to confrontation under the Sixth Amendment. Wright v. State, 916 N.E.2d 269 (Ind. Ct. App. 2010), *trans. denied*.

Bishop v. State, 40 N.E.3d 935 (Ind. Ct. App. 2015) (Sixth Amendment Confrontation Clause does not bar admission of dying declarations because common law at time of founding held that un-confronted testimonial dying declarations were admissible).

a. Foundation

(1) Unavailable

For a detailed analysis of the unavailability requirement, see section IV.C, *supra,* concerning Rule 804 of this Chapter.

(2) Declarant must believe death is imminent

For a dying declaration to be admissible, it must be shown that the declarant knew that death was certain or that he had given up hope for recovery. Dean v. State, 432 N.E.2d 40, 45 (Ind.1982). It is within the discretion of a trial court to determine whether the declarant believed his death was certain at the time of the statement. Id.

Wright v. State, 916 N.E.2d 269 (Ind. Ct. App. 2010), *trans. denied* (victim made statements while lying on neighbor's front porch having sustained sixteen severe stab wounds to his face, neck, chest, and back).

Dean v. State, 432 N.E.2d 40 (Ind.1982) (declarant's intestines were hanging out, and in the ambulance en route to the hospital, stated: "Hurry, I'm going fast"; the statement was admissible since the man was seriously ill and at the point of death).

Lynch v. State, 552 N.E.2d 56, 60 (Ind. Ct. App. 1990) (two hours after being shot, while the victim was hospitalized and stable, he told a police officer that his son had shot him; the statement did not qualify as a dying declaration because it was not made when the victim knew his death was certain; harmless error), *rev.'d on other grounds*, 632 N.E.2d 341 (Ind. 1994).

The declarant need not say directly that he expects to die. Morgan v. State, 31 Ind. 193 (1869). The declarant's belief of imminent death at the time of the statement may be inferred by the surrounding circumstances such as the declarant's statements, nature of wounds, and the administration of last rites. See Williams v. State, 168 Ind. 87, 79 N.E. 1079 (1907).

Beverly v. State, 801 N.E.2d 1254 (Ind. Ct. App. 2004) (statement that "Jerry shot me" was admissible; inference that the victim knew death was imminent and had abandoned all hope of recovery could be drawn from the nature of the gunshot wound to the head and victim's decreased level of consciousness; it was irrelevant that victim briefly stabilized after arriving at a hospital).

Dean v. State, 432 N.E.2d 41 (Ind. 1982) (where victim was thrashing around and asking those around him to let him die, his statements to officer were admissible).

Gerrick v. State, 451 N.E.2d 327 (Ind. 1983) (shortly after making statement, victim told witness he was dying; victim had been shot twice in back and could not move arms; statements admissible).

Although the witness may eventually die, this fact alone does not permit all out-of-court declarations of the witness related to the homicide to be admitted under the exception. Anderson v. State, 471 N.E.2d 291, 292 (Ind. 1984)

Anderson v. State, 471 N.E.2d 291, 292 (Ind. 1984) (error to admit as a dying declaration the victim's statement that two men had taken her purse; the victim stated to onlookers that she was all right and did not need an ambulance; thus, the statements did not fall within the requirements of the dying declaration exception; harmless error because the statements fell within the excited utterance exception.)

(3) Statement must relate to cause or circumstances of what declarant believed to be impending death

It is essential that the declarant's statement relate to the cause or circumstances giving rise to his fatal injury. It may not include what happened before or after the act. Thompson v. State, 796 N.E.2d 834 (Ind. Ct. App. 2003).

Stephenson v. State, 205 Ind. 141, 179 N.E. 633 (1932) (statement admitted declaring identity of the killer, and facts connected to the alleged crime.)

Thompson v. State, 796 N.E.2d 834 (Ind. Ct. App. 2003) (post-conviction court erroneously admitted the co-defendant's statement just prior to his execution that the defendant "did not know what was going on" under "dying declaration" exception because it did not relate to the circumstances of his death) (Sullivan, J., dissenting in part).

b. Statement need not be spontaneous

Dying declarations do not have to be spontaneous. They may be in writing or may be made in response to the questions of another. Anderson v. State, 205 Ind. 607, 186 N.E. 316 (1933).

Hackner v. State, 161 N.E.3d 1287 (Ind. Ct. App. 2021) (no abuse of discretion to admit officer's testimony a head movement was a "yes" in response to his question; a dying victim's non-verbal identification of the perpetrator, in response to an officer's question, is a question of credibility and not admissibility).

c. Circumstances surrounding declarant's death

There is no need to inform the jury of any of the factors relating to the witness' absence. Moore v. State, 440 N.E.2d 1092 (Ind. 1982).

Moore v. State, 440 N.E.2d 1092 (Ind. 1982) (where trial court allowed State to introduce death certificate of declarant which stated "homicide investigation" but did not allow defense to enter evidence of the suicide note found near the declarant's body, the defendant was deprived of a fair trial as guaranteed him by the Sixth and

Fourteenth Amendments and Indiana Constitution, Article 1, Section 12 and was fundamental error requiring reversal of rape conviction).

3. Statement against interest - Rule 804(b)(3)

Hearsay of an unavailable declarant is admissible if it is "[a] statement that a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so far contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception. Indiana Rule of Evidence 804(b)(3).

a. Statements of co-defendants or accomplices

(1) Implicate both declarant and accused

Unlike Federal Evidence Rule 804(b)(3), Indiana's Rule 804(b)(3) explicitly excludes "[a] statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused[.]" Rule 804(b)(3). "[O]ur supreme court's addition of this provision to Indiana Evidence Rule 804(b)(3) appears to be a deliberate choice." State v. Chavez, 956 N.E.2d 709, 713 (Ind. Ct. App. 2011).

Payne v. State, 854 N.E.2d 7 (Ind. Ct. App. 2006) (witness's videotaped statement clearly implicated both himself and the defendant, and thus it falls squarely within types of statements hearsay rules intended to exclude; although the defendant's name is not mentioned in the videotape, there was no other valid legal reason to admit videotape than to prove that burglary was committed in accordance with the defendant's instructions, i.e., entering through second floor window of residence); see also Garth v. State, 182 N.E.3d 905 (Ind. Ct. App. 2022).

Lilly v. Virginia, 119 S. Ct. 1887 (1999) (accomplice testimony that primarily switches blame to the defendant is not against penal interest).

(2) Limited to parts of statements that implicates only declarant

Fact that declarant is making a broadly self-inculpatory statement, however, does not make self-exculpatory portions any more reliable or credible. In fact, self-exculpatory statements are most likely to be false, and mere proximity to self-inculpatory statements does not reduce that likelihood. Williamson v. U.S., 512 U.S. 594, 114 S. Ct. 2431 (1994). Thus, exception to hearsay rule for statements against penal interest does not allow admission of non-self-inculpatory statements, even if they are made within broader narrative that is generally self-inculpatory. Id.

The fact that a statement is self-inculpatory does make it more reliable; but the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. There is no reason why collateral statements,

even ones that are neutral as to interest, should be treated any differently from other hearsay statements that are generally excluded. Williamson v. U.S., 512 U.S. 594, 599-600, 114 S. Ct. 2431 (1994); Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999).

PRACTICE POINTER: Even if a statement does not fall under this exception to hearsay, if the statement is exculpatory by making it more probable that a third party committed the crime, the statement is admissible under the Sixth Amendment. Joyner v. State, 678 N.E.2d 376 (Ind. 1997); Allen v. State, 813 N.E.2d 349 (Ind. Ct. App. 2004); Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727 (2006); Griffin v. State, 763 N.E.2d 450 (Ind. 2002).

b. Rationale

The exception is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. Williamson v. U.S., 512 U.S. 594, 114 S. Ct. 2431 (1994). One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature. Id. at 2435.

The law has long recognized the credibility inherent in a statement which at the time of its making so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true. Wilson v. State, 677 N.E.2d 586 (Ind. Ct. App. 1997).

c. Foundation

(1) Against declarant's interest

Whether a statement is in fact against interest must be determined from the circumstances of each case. A statement against interest must be incriminating on its face to be admissible under this exception. It is not enough that a statement against interest for purposes of the exception to the hearsay rule merely arouses some suspicion as to culpability in the factual context of the case. Webb v. State, 149 N.E.3d 1234, 1240 (Ind. Ct. App. 2020). A statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. The same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. Williamson v. U.S., 512 U.S. 594, 601-602, 114 S. Ct. 2431 (1994). A statement made to police after being caught red-handed in a crime is generally not against the declarant's penal interest. State v. Spillers, 847 N.E.2d 949 (Ind. 1996).

Tolliver v. State, 922 N.E.2d 1272 (Ind. Ct. App. 2010), *trans. denied* (trial court abused discretion in letting murder victim's family members testify that before dying, victim said he would "get" the Defendant and would "handle it himself," because statements were not facially incriminating and did not implicate victim

in a crime but were mere statements of intent and not admissible under Rule of Evidence 804(b)(3); however, error was harmless).

Badelle v. State, 754 N.E.2d 510 (Ind. Ct. App. 2001) (detective's and deputy public defender's affidavits that they thought the defendant was innocent were not sufficiently against their interest to be admissible; possible employment repercussions or civil suits directed towards detective from his purported statements, both as relayed by public defender and contained in her written records, failed to convince the court that such statements were contrary to his pecuniary or proprietary interest or of sort that would have subjected him to civil or criminal liability).

Williams v. State, 757 N.E.2d 1048 (Ind. Ct. App. 2001) (defendant's father's statement, made to business associate in contemplation of his suicide and to exonerate his son, cannot be characterized as "so far contrary" to father's interest that reasonable person in declarant's position would not have made statement unless believing it to be true).

Bardonner v. State, 587 N.E.2d 1353 (Ind. Ct. App. 1992) (officer would have testified that cellmate gave "clean up" statement for which he was granted limited immunity, and admitted home burglary; however, statement was not particularized enough to conclude it was same home involved in defendant's case; trial court did not abuse its discretion in finding that statement did not expose cellmate to criminal liability and was not sufficiently accompanied by corroborating circumstances to make it admissible).

Webb v. State, 149 N.E.3d 1234, 1240 (Ind. Ct. App. 2020) ("at most, Webb was able to demonstrate only that her statement is both exculpatory and inculpatory in nature, which is insufficient to merit the application of Evidence Rule 804(b)(3).").

(2) Declarant must believe statement to be against interest

If the declarant does not believe the statement to be against his interest, the rationale for the exception fails. Jervis v. State, 679 N.E.2d 875, 880, n.6 (Ind.1997) (*citing* 4 *Weinstein's Evidence,* Par. 804(b)(3)[02], at 804-47 (1996) (collecting cases).

Beasley v. State, 46 N.E.3d 1232 (Ind. 2016) (victim gave testifying witness a precise account of his altercation with defendant and stated in no uncertain terms that he shot defendant in the face; even if victim described himself as acting in self-defense, it does not necessarily follow that he believed there was no possibility of future civil or criminal liability for the act).

(3) Personal Knowledge

Federal Rule 804(b)(3) is subject to the personal knowledge requirement of Rule 602. See United States v. Lanci, 669 F.2d 391 (6th Cir.1982), *cert. den.* This is consistent with pre-existing Indiana law, which required that the proponent show that the declarant either possessed competent knowledge of the facts, that it was his duty to

know them, or that he had the requisite means of knowledge. Dean v. Wilkerson, 126 Ind. 338, 26 N.E. 55, 56 (1890).

Davis v. State, 635 N.E.2d 1117 (Ind. Ct. App. 1994) (trial court did not err in refusing to allow evidence of purported confession by others to victim's murder because evidence was inadmissible, double hearsay; the declarant did not confess to the witness; see also Cook v. State, 119 N.E.3d 1092 (Ind. Ct. App. 2019).

(4) Reliability

The main concern with declarations against penal interest has been that they encourage perjured and fraudulent third-party confessions aimed at exonerating the accused. The federal rule requires corroborating circumstances to indicate the trustworthiness of the statement. This requirement is not strictly required by the Indiana rule and the Indiana Supreme Court declined to address what indicia of trustworthiness is acceptable. Jervis v. State, 679 N.E.2d 875, 880, n.5 (Ind.1997); see Lilly v. Virginia, 527 U.S. 116, 119 S. Ct. 1887 (1999).

However, before admitting statement offered under Indiana Evidence Rule 804(b)(3), as statement against interest exception to hearsay rule, trial courts should evaluate the overall reliability of the proffered statement. Reliability is the ultimate justification for admission of statements against interest. Jervis v. State, 679 N.E.2d 875 (Ind. 1997).

Jervis v. State, 679 N.E.2d 875 (Ind. 1997) (third party's statement that he picked up a woman and dumped her off near the location where the victim's body was found was not sufficiently against interest or reliable to be admitted; defendants did not even claim victim was same woman referred to in the statement).

Camm v. State, 908 N.E.2d 215 (Ind. 2009) (statement of third party who was at crime scene and indisputably involved in triple murders that he had three bodies on his conscience and that one more wouldn't matter was not admissible as statement against interest because the statement was not an admission to a crime or incriminating on its face).

Swanigan v. State, 720 N.E.2d 1257 (Ind. Ct. App. 1999) (although the State conceded that statements in letters were against the declarant's penal interest and that the declarant was unavailable, trial court did not abuse its discretion in excluding statements due to their overall unreliability; letters included information about declarant's mental illness and drug and alcohol abuse and were contradictory).

Thomas v. State, 580 N.E.2d 224 (Ind. 1991) (where eyewitness originally picked out third party from line-up and that third party had stated he committed the burglary, the hearsay statements were admissible as statements against penal interest).

U.S. v. Paguio, 114 F.3d 928 (9th Cir. 1997) (father's statement that his son "had nothing to do" with it should have been admitted along with the father's

statement that he had falsified certain forms and provided false information to accountant).

To satisfy the residual "trustworthiness" test (that the declarant's truthfulness is so clear that cross-examination would be of marginal utility), hearsay evidence used to convict the defendant must possess an indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. Lilly v. Virginia, 119 S. Ct. 1887 (1999). Reliability of the statement, itself, is not the same thing as corroborative evidence of the statement. Swanigan v. State, 720 N.E.2d 1257 (Ind. Ct. App. 1999).

4. Statement of personal or family history - Rule 804(b)(4)

Hearsay of an unavailable declarant is admissible if it is a statement about: "(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or (B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate." Indiana Rule of Evidence 804(a)(4).

a. Beliefs about family matters

Emberry Comm.Church v. Bloomington Dist. Missionary and Church Extension Society, 482 N.E.2d 288, 295 (Ind. Ct. App.1985) (witness discussed her family history with her mother prior to her mother's death; her testimony, founded upon declarations of her deceased mother, was admissible).

See also Rule 803(19).

b. Foundation

There is no requirement of personal knowledge under Rule 804(b)(4). Further, the statement need not have preceded the controversy at issue. See, *Advisory Committee Note to Fed. R. Evid. 804(b)(4)(B)*.

5. Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability – Rule 804(b)(5)

Hearsay of an unavailable declarant is admissible if it is "[a] statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness for the purpose of preventing the declarant from attending or testifying." Indiana Rule of Evidence 804(b)(5). Adopted by amendment in 2009, this rule applies to all parties, including the State in criminal cases. See, e.g., United States v. Skilling, 554 F.3d 529 (5th Cir. 2009).

A criminal defendant forfeits the right to confrontation by engaging in conduct designed to prevent a declarant from testifying. Giles v. California, 554 U.S. 353, 368, 128 S. Ct. 2678 (2008).

White v. State, 978 N.E.2d 475 (Ind. Ct. App. 2013) (trial court properly admitted hearsay statements of defendant's wife, whom defendant murdered, about his abusive behavior because the State proved by preponderance of evidence that defendant murdered wife, in part, to prevent her from testifying at a provisional custody hearing regarding their child).

Carr v. State, 106 N.E.3d 546 (Ind. Ct. App. 2018) (defendant's wrongdoing forfeited Sixth Amendment right to confront declarant, who was unavailable); see also Scott v. State, 139 N.E.3d 1148 (Ind. Ct. App. 2020).

V. HEARSAY WITHIN HEARSAY - RULE 805

A. OFFICIAL TEXT:

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

B. DEFINITION OF HEARSAY WITHIN HEARSAY

Hearsay has been called "a tale of a tale." 2 *McCormick on Evidence* §244, 176 (7th ed.). Double hearsay "has been called a tale of a tale of a tale." When the witness reports on the stand that one declarant stated to him that another declarant made a given statement, this may be termed "double hearsay," if both statements are offered to prove the facts asserted. Tenta v. Guraly, 221 N.E.2d 577, 581 (Ind. Ct. App.1966); Wilson v. State, 39 N.E.3d 705 (Ind. Ct. App. 2015).

> Steen v. State, 987 N.E.2d 159 (Ind. Ct. App. 2013) (testimony that tags on stolen clothes bore store's name was not double hearsay because store's name on label is not capable of being true or untrue; testimony about tags was not offered for truth of matter asserted).

C. RATIONALE: NO PERSONAL KNOWLEDGE

Double hearsay is generally inadmissible because it also fails the requirement that the witness have personal knowledge of the matter testified to. The question of personal knowledge is separate from the hearsay rule. While a witness may have knowledge of what A told her, she would be without personal knowledge of what B told A. Tenta v. Guraly, 140 Ind. App. 160, 221 N.E.2d 577, 581-82 (1966) (the requirement of personal knowledge "is a rule more ancient than the hearsay rule...").

> Davis v. State, 635 N.E.2d 1117 (Ind. Ct. App. 1994) (trial court properly excluded statements in which proposed witnesses would state that another person had told them that declarants had confessed to committing the murder for which defendant was convicted; the proposed testimony was hearsay within hearsay). But see Allen v. State, 813 N.E.2d 349 (Ind. Ct. App. 2004).

D. HEARSAY WITHIN HEARSAY TEST

Each level of hearsay must qualify under an exception to the hearsay rule. Mayberry v. State, 670 N.E.2d 1262, 1267 (Ind. 1996).

> City of Indianapolis v. Taylor, 707 N.E.2d 1047 (Ind. Ct. App. 1999) (a witness' statement that another person told her of a police officer's confession to shooting a teenager was admissible as excited utterances because the declarant was still in an excited state over the events surrounding the victim's death and the statements of the police officers were statements of party-opponents).

U.S. v. Severson, 49 F.3d 268 (7thCir. 1995) (defendants attempted to have memorandum of conversation between two persons admitted; defendants could not establish that the hearsay within hearsay came under an exception to the hearsay rule).

Mayberry v. State, 670 N.E.2d 1262 (Ind. 1996) (privileged communication retained its privileged character where client, victim of murder, had not consented to its disclosure).

Allen v. State, 813 N.E.2d 349 (Ind. Ct. App. 2004) (a transcript of former testimony in which the witness claims that another person told him of his involvement in the murders was admissible being that the transcript was former testimony under Indiana Rule of Evidence 804 and the statements were critical to the defendant's Sixth Amendment right to present a defense).

E. RELATIONSHIP TO RULE 801(d)

While Rule 805 "is cast in terms of hearsay exceptions, otherwise admissible hearsay evidence of a party-opponent's statement satisfies Rule 805 because Rule 801(d)(2) defines opponent's statements as non-hearsay." Miller, 13 *Indiana Evidence* 529 § 805.101 (4th ed.).

City of Indianapolis v. Taylor, 707 N.E.2d 1047 (Ind. Ct. App. 1999) (a witness' statement that another person told her of a police officer's confession to shooting a teenager was admissible as excited utterances because the declarant was still in an excited state over the events surrounding the victim's death and the statements of the police officers were statements of party-opponents).

Southern Stone Co. v. Singer, 665 F.2d 698 (5th Cir. 1982) (although one level of a double hearsay statement is admissible under Rule 801(d)(2)(A), the second level of hearsay was not subject to an exception, so the document was inadmissible).

United States v. Pendas-Martinez, 845 F.2d 938, 942-43 (11th Cir.1988) (part of report admissible under Rule 801(d)(1)(B), but other levels of hearsay should have been redacted from report).

F. RELATIONSHIP TO RULE 403

Rule 805 places no limit on the permissible number of tiers of hearsay. However, "[t]he fact that all hearsay objections to statements consisting of multiple hearsay can be overcome by exceptions to the hearsay rule does not mean that the Court must admit the evidence." Saltzburg, et al., *Federal Rules of Evidence,* vol. 3, p. 1668 (6th ed. 1994). Trial courts have the discretion under Rule 403 to determine that hearsay within hearsay is especially dangerous or prejudicial evidence and can exclude it under Rule 403 in cases where the probative value of the evidence is substantially outweighed by its prejudicial effect. After determining whether the statements are hearsay, a trial court must "address the probative value-versus-prejudice question." City of Indianapolis v. Taylor, 707 N.E.2d 1047, 1056 (Ind. Ct. App. 1999).

With each layer of multiple hearsay, the accuracy of the statements are diminished. In this context, Rule 403 may operate to authorize the court to exclude multiple hearsay where the court determines the reliability of the evidence has been diminished to an unacceptable extent. Reeves

v. Boyd & Sons, Inc., 654 N.E.2d 864, 876 (Ind. Ct. App. 1995) (Riley, J. concurring in part and dissenting in part).

United States v. Fernandez, 892 F.2d 976 (11th Cir. 1988) (noting the logical inverse relationship between the reliability of a statement and the number of hearsay layers it contains).

G. DOUBLE HEARSAY IN OTHER PROCEEDINGS

1. Search Warrant Applications

A search warrant affidavit is based on double hearsay when the officer seeking the warrant reports what another person allegedly tells an informant. When based on hearsay, the affidavit must "contain reliable information establishing the credibility of the source and of each of the declarants of the hearsay and establishing that there is a factual basis for the information furnished," or "contain information that establishes that the totality of the circumstances corroborates the hearsay." IC 35-33-5-2(b). The Legislature incorporated specific requirements into the statute to assure that the hearsay constituting the probable cause was credible in the mind of the issuing authority and not merely in the mind of the affiant. Houser v. State, 678 N.E.2d 95, 99-100 (Ind. 1997).

a. Credibility

If there is no corroboration, the hearsay may be acceptable if the credibility of the source and of each of the declarants of the hearsay is established. Newby v. State, 701 N.E.2d 593 (Ind. Ct. App.1998).

Declarations against penal interest can furnish sufficient basis for establishing the credibility of an informant within the meaning of IC 35-33-5-2(b)(1). Houser v. State, 678 N.E.2d 95, 100 (Ind.1997). However, if an informant's tip occurs after he has been caught with contraband, the tip cannot be considered a statement against penal interest but rather an attempt to curry favor with the prosecutor. State v. Spillers, 847 N.E.2d 949 (Ind. 2006); Hirshey v. State, 852 N.E.2d 1008 (Ind. Ct. App. 2006).

Newby v. State, 701 N.E.2d 593 (Ind. Ct. App.1998) (trial court erred by refusing to suppress evidence recovered as a result of faulty search warrant; there was insufficient probable cause to issue the warrant because information in warrant application did not establish totality of circumstances corroborating hearsay of affiant for warrant; the affidavit was based on hearsay within hearsay; the officer seeking the warrant was reporting what an informant had allegedly told another officer; the informant's statement after he was arrested did not amount to a declaration against penal interest under hearsay exception Rule 804(b)(3)).

b. Corroboration

If there is no evidence that informant is a credible source, the information must be corroborated by the totality of the circumstances. Houser v. State, 678 N.E.2d 95, 100 (Ind. 1997).

Uncorroborated hearsay from a source whose credibility is unknown in itself cannot support a finding of probable cause to issue a warrant. Newby v. State, 701 N.E.2d 593 (Ind. Ct. App. 1998); Jaggers v. State, 687 N.E.2d 180, 181 (Ind. 1997); Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983).

PRACTICE POINTER: Hearsay within hearsay points to raise at search warrant suppression hearing where there was an informant:

(1) How did the affiant obtain the information in the affidavit?
(2) If the affiant obtained the information from third person other than the informant, how was the information obtained by the affiant?
(3) How did the third person obtain the information from the informant?
(4) What was motive of informant in providing the information?
(5) Has the informant been used as an informant before?
(6) Was the informant under investigation or in custody at the time the information was given?
(7) Has the informant been charged with a crime?
(8) Was the informant promised anything in return for the information?
(9) Was corroborating information sought before application for the search warrant? If so, how was the corroborating information obtained?

2. Sentencing Hearing

Reliance on hearsay which lacks indicia of reliability may result in reliance on improper or inaccurate information in making the sentencing determination and require remand for a new sentencing. Thomas v. State, 562 N.E.2d 43, 48 (Ind. Ct. App. 1990).

United States v. Harris, 558 F.2d 366 (7th Cir. 1977) (where PSR included hearsay on hearsay allegations and judge did not disclose factors relied upon in imposing maximum sentence, sentence was vacated and remanded for resentencing after affording defendant opportunity to contest accuracy of serious hearsay allegations).

VI. ATTACKING AND SUPPORTING THE DECLARANT'S CREDIBILITY - RULE 806

A. OFFICIAL TEXT:

When a hearsay statement - or a statement described in Rule 801 (d)(2)(C), (D), or (E) - has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

B. RULE GOVERNS IMPEACHMENT AND REHABILITATION OF DECLARANT

Rule 806 allows a party to impeach a non-testifying hearsay declarant. U.S. v. Burton, 937 F.2d 324, 328-29 (7th Cir. 1991).

1. An unavailable declarant is, in effect, a witness

The declarant of a hearsay statement which is admitted into evidence is in effect a witness. His credibility should in fairness be subject to impeachment under Rules 608 and 609 and support as though he had in fact testified. U.S. v. Noble, 754 F.2d 1324, 1331 (7th Cir. 1985), *cert. den.,* 474 U.S. 812, 106 S. Ct. 63 (1985).

2. Rule 806 does not allow evidence otherwise inadmissible

Rule 806 does not allow the use of evidence made inadmissible by some other rule. Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed. Counsel may use any evidence which would be admissible if declarant had testified as a witness. U.S. v. Finley, 934 F.2d 837, 839 (7th Cir. 1991).

> United States v. Lechoco, 542 F.2d 84, 88 (D.C. Cir. 1976) (holding that, when the State used Rule 806 to challenge the veracity of a defendant's statements to psychiatrists, on which statements the doctors based their opinions concerning the defendant's mental state at the time of the offense, evidence of the defendant's character for truthfulness "went to the heart of his guilt or innocence" and was admissible substantively).

PRACTICE POINTER: Use Evidence Rule 806 to attack the credibility of a prosecution witness who does not testify at trial, and to rehabilitate the credibility of other declarants, including your client. If the State introduces hearsay statements, then the defendant can impeach that person as if they were testifying in any way you could have attacked the declarant had he or she taken the stand. Ways to attack or support a witness's credibility under Rule 806:

1. Proof of declarant's character for truthfulness, including evidence that he has been convicted of a crime.
2. Proof that another witness specifically contradicts the declarant.
3. Proof that the declarant made a prior inconsistent statement.
4. Proof that the declarant is biased.
5. Proof that the declarant is deficient in an element of competency.

C. CREDIBILITY

1. Impeachment of non-testifying defendant's statements

Prosecution may impeach even a non-testifying defendant if that defendant offers past exculpatory statements into evidence. U.S. v. McClain, 934 F.2d 822, 833 (7th Cir.1991) (*citing* United States v. Noble, 754 F.2d 1324, 1330-32 (7th Cir.1985), *cert. den.,* 474 U.S. 818, 88 L. Ed. 2d 51, 106 S. Ct. 63 (1985)).

> United States v. Lawson, 608 F.2d 1129, 1130 (6th Cir. 1979) (even though defendant did not testify, his counsel cross-examined a Secret Service agent to establish that defendant had consistently denied any involvement in a counterfeiting scheme, and introduced a written statement in which defendant denied all complicity; by putting these hearsay statements before the jury, defendant's credibility became an issue in the case the same as if Lawson had made the statements from the witness stand; thus defendant's two prior convictions were admissible, pursuant to Rule 806).

However, the State cannot open its own door to impeachment evidence of the defendant by putting into evidence inconsistent statements made by the defendant. Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004).

> Camm v. State, 812 N.E.2d 1127 (Ind. Ct. App. 2004) (evidence of extra-marital affairs were not admissible to impeach the defendant's statement to police that his marriage was perfect because the State put the defendant's statements into evidence).

2. Non-testifying coconspirators

Defendant in general is allowed to impeach the credibility of non-testifying coconspirators with evidence of prior crimes. Rule 806 allows impeachment of the credibility of a declarant of an 801(d)(2)(E) statement as if that declarant had testified as a witness. Rule 609 allows impeachment of a witness's credibility with evidence of certain prior crimes. U.S. v. Robinson, 783 F.2d 64, 67-68 (7th Cir. 1986).

a. Unnecessary to have coconspirator declared hostile witness

Rule 806 would not require respondent to make the showing necessary to have declarant coconspirator declared a hostile witness. U.S. v. Inadi, 475 U.S. 387, 106 S. Ct. 1121 (1986).

b. Non-testifying coconspirators who are codefendants

Problems arise when the co-conspirator/declarant whose credibility is subject to attack by evidence of prior crimes is also a co-defendant. There is a danger of prejudicing the presumption of innocence of that co-defendant by admission of evidence of his prior crimes, such evidence being generally inadmissible to show the character or guilt of the codefendant under Rule 404(b). U.S. v. Robinson, 783 F.2d 64, 67-68 (7th Cir. 1986).

PRACTICE POINTER: One solution to this problem is for the trial court to admit the evidence of prior crimes but to instruct the jury that the evidence is to be considered only to assess the credibility of the declarant and not as evidence of the declarant/co-defendant's propensity to commit the crime in the instant case. A course more favorable to defendant is for each codefendant to weigh the value of being able to impeach the credibility of each other codefendant against the prejudice to each of having his criminal convictions before the jury. By requesting the court to deny impeachment with evidence of prior convictions, each defendant's presumption of innocence is protected. When a choice must be made between allowing impeachment of non-testifying co-defendants' credibility with evidence of prior crimes and protecting those co-defendants from prejudice, the decision should be made by the co-defendants themselves if they all agree that impeachment is more valuable than the resulting prejudice is detrimental. U.S. v. Robinson, 783 F.2d 64, 68 (7th Cir. 1986).

D. INCONSISTENT STATEMENTS

Inconsistent statements made after the hearsay statement was made may be used to impeach the declarant. Miller, 13 *Indiana Evidence* 532-33 § 806.101 (4th. ed.) (*citing* Advisory Committee's Note to Fed.R. Evid.806).

Mundy v. Angelicchio, 623 N.E.2d 456 (Ind. Ct. App. 1993) (since statements were not inconsistent with any previous testimony and did not impeach other testimony, the court did not need to go any further to determine that the evidence was not admissible under Rule 806.)

E. CROSS-EXAMINATION

1. Rule 806 and Confrontation Clause distinguished

Rule 806 allows the impeachment of a non-testifying hearsay declarant by statements from a testifying witness. On its face, the rule applies where the defendant seeks to attack the credibility of the declarant by having a third person recite unavailable declarant's statements. The Confrontation Clause gives the defendant a different right: to demand the physical presence of declarant and an opportunity to cross-examine him or her. Direct confrontation of declarant presumably is preferable to indirect impeachment of unavailable declarant by witness's testimony. U.S. v. Burton, 937 F.2d 324, 328-29 (7th Cir. 1991).

2. Abuse of discretion to disallow requested cross examination

If the defendant properly raises a Rule 806 objection, it is an abuse of discretion to disallow cross-examination of the witness to impeach declarant. U.S. v. Burton, 937 F.2d 324, 329 (7th Cir. 1991).

United States v. Grant, 256 F.3d 1146, 1152-56 (11th Cir. 2001) (conviction reversed because trial court improperly excluded inconsistent statements offered by defense to impeach co-conspirator whose out-of-court statements were introduced by the prosecution).

United States v. Moody, 903 F.2d 321 (5th Cir. 1990) (conviction reversed where trial court refused to allow defense counsel to cross-examine the testifying witness about the co-conspirators' reputations for dishonesty).

3. Properly made Rule 806 objection may also constitute Confrontation Clause objection

When the declarant is unavailable to testify, the defendant's Sixth Amendment right may be compromised if the court, in contravention of Rule 806, disallows cross-examination of a witness who does testify as to declarant's statements. Cross-examination of the testifying witness in such a case may be defendant's only chance to place before the jury a legitimate question as to the truth of the hearsay declarations of the unavailable declarant. The defendant may clarify the matter simply by requesting that the government produce declarant or by themselves asking that the court issue a subpoena for declarant to appear as a witness. U.S. v. Burton, 937 F.2d 324 (7th Cir.1991).

PRACTICE POINTER: At trial defendant properly raised right to impeachment under Rule 806. In his testimony, prosecution witness described the investigation and introduced audio tapes. After a tape-recorded conversation between defendant and third person/declarant had been played, defendant notified the judge that he would like to explore third person/declarant's criminal background indirectly through cross-examination of witness. Defense argued at sidebar, "We think that under 806 we are permitted to do that". Defendant's counsel read the rule correctly, for it allows one to impeach the credibility of a non-testifying hearsay declarant by any evidence that would be admissible had the declarant testified. But defense counsel never asked the court to honor the distinct Sixth Amendment-based right he could have claimed: the opportunity to confront and cross-examine third person/declarant himself. That should be requested unless trial strategy dictates otherwise. U.S. v. Burton, 937 F.2d 324 (7th Cir.1991).

F. RELATIONSHIP TO OTHER RULES

1. Rule 607

Rule 607 allows impeachment of a witness. However, to qualify as a witness, the declarant's testimony must be relevant. U.S. v. McClain, 934 F.2d 822, 832-833 (7th Cir.1991).

2. Rule 608

The declarant of a hearsay statement which is admitted into evidence is in effect a witness. His credibility should in fairness be subject to impeachment under Rules 608 and 609 and

support as though he had in fact testified. U.S. v. Noble, 754 F.2d 1324, 1331 (7th Cir.1985) (*citing Advisory Committee Notes to Proposed Federal Rule 806*), *cert. den.,* 474 U.S. 812, 106 S. Ct. 63 (1985).

3. Rule 609

Rule 609 impeachment does not require balancing test. Court need not balance the prejudicial effect of the admission of the prior conviction against its probative value when admitting such evidence under Fed. R. Evid. Rule 609(a)(2) for the purpose of impeachment. U.S. v. Noble, 754 F.2d 1324, 1331 (7th Cir.1985).

4. Rule 613

If the hearsay declarant is to be impeached by inconsistent statement or conduct, Rule 806 eliminates the requirement of Evidence Rule 613(b) that the declarant be given an opportunity to explain or deny the other statement or conduct, even if the inconsistent statement was made during a deposition, or the hearsay evidence consisted of former testimony. Miller, 13 *Indiana Evidence* 532 § 806.101 (4th ed.).

VII. APPELLATE REVIEW

A trial error in the admission of hearsay evidence warrants reversal if the record as a whole discloses that the erroneously admitted evidence was likely to have had a prejudicial impact upon the mind of the average juror, thereby contributing to the verdict. Hernandez v. State, 785 N.E.2d 294 (Ind. Ct. App. 2003).

A. DETERMINE IMPACT OF IMPROPERLY ADMITTED EVIDENCE ON JURY

The reviewing court must assess the probable impact of that evidence upon the jury. Craig v. State, 630 N.E.2d 207, 211-12 (Ind. 1994).

The presence of jury admonitions may be considered in determining whether an error is harmless. However, an admonishment does not always cure the error. Bonner v. State, 650 N.E.2d 1139 (Ind. 1995).

B. UNOBJECTED-TO HEARSAY MAY CONTRIBUTE TO SUFFICIENCY OF THE EVIDENCE

Although inadmissible in the face of a proper objection, hearsay evidence is not inherently unreliable for purposes of an inquiry into the sufficiency of the evidence on appeal. The trier of fact may consider hearsay evidence that is relevant and admitted without objection. Humphrey v. State, 680 N.E.2d 836, 840-41 (Ind. 1997), *post-conviction relief granted*, 73 N.E.3d 677 (Ind. 2017).

1. Bound by admonishment

However, a court, in its sufficiency analysis, is limited by the instructed purpose of the hearsay set forth in an admonishment. Thus, if the jury was admonished the hearsay was not admitted for the purposes of proving the truth of the matter, the hearsay cannot be considered

for the truth of the matter in the sufficiency analysis. Vest v. State, 621 N.E.2d 1094 (Ind. 1993).

2. Reduced probative value

Further, "hearsay evidence, standing alone, and not clothed with indicia of reliability associated with the exceptions which may render it admissible, is not sufficient evidence of probative value to sustain a conviction." Jackson v. State, 485 N.E.2d 144, 147 (Ind. Ct. App. 1985). "Hearsay evidence is not sufficient evidence of probative value to sustain a conviction when it is the only evidence on an essential element of the offense. Of necessity, the fact finder is giving credit to the hearsay evidence based upon the credibility of the non-declarant witness through whom the out-of-court statement is admitted rather than the credibility of the declarant. That circumstance, which necessarily means the evidence was never subjected to the safeguard of cross-examination, deprives it of probative value." Id. at 149.