

Evidence: Indiana Moves Toward Adoption of the Federal Rules

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The most significant development in Indiana law of evidence in 1992 is the Indiana Supreme Court's clear indication that it will soon adopt the Federal Rules of Evidence, or something comparable. The Indiana Supreme Court's movement toward the Federal Rules is indicated by a number of its decisions and its order of November 4, 1992, establishing "an *ad hoc* committee to study and propose for adoption by this Court written rules of evidence for use in the trial courts of this state."¹ As indicated in this order, it is anticipated that the court will adopt the rules to take effect on January 1, 1994.

Several weeks before ordering the establishment of the *ad hoc* committee, the Indiana Supreme Court demonstrated a willingness to conform Indiana law to the Federal Rules of Evidence by adopting Rule 404(b), one of the more controversial federal rules. In *Lannan v. State*,² the court granted a transfer in order to re-examine the "depraved sexual instinct" exception to the general rule excluding character evidence, such as prior bad acts, offered solely to indicate a propensity to act in conformity with those acts.³ Lannan, who was convicted of sexually molesting a young girl, challenged the admission of testimony from the victim regarding uncharged instances of molestation and the testimony of another girl who also accused Lannan of molesting her.⁴ Although the supreme court held that the evidence of an alleged incident between the victim and Lannan in Lannan's truck a year before the charged incident was improperly admitted, it affirmed Lannan's conviction because the impact of the earlier incident "was not of sufficient weight to require reversal."⁵ The court noted that evidence that Lannan fondled the victim's cousin just prior to having intercourse with the victim was

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1. This order establishes a committee with 28 members divided into four 4 regions. Each region was assigned a number of articles of the Uniform Rules of Evidence and was to submit a written report of recommendations and comments to the court by Feb. 28, 1993. The chair of each regional committee and Justice Krahulik will constitute a subcommittee with responsibility for reviewing the regional reports and submitting a final report to the Indiana Supreme Court.

2. 600 N.E.2d 1334 (Ind. 1992).

3. *Id.* at 1335.

4. *Id.*

5. *Id.* at 1341.

properly admitted under the theory of *res gestae*, “under which the state is allowed to present evidence that completes the story of the crime in ways that might incidentally reveal uncharged misconduct.”⁶

Before holding that evidence of the prior incident was inadmissible under Rule 404(b), which the court “adopt[ed] in its entirety,”⁷ the court rejected the “depraved sexual instinct” exception.⁸ It rejected the “depraved sexual instinct exception” after examining the reasons supporting it, which include the high rate of recidivism and the need to bolster the victim’s testimony.⁹ The court agreed that recidivism is high among sexual deviates but declared that recidivism alone does not justify deviating from the general rule, which excludes such evidence of prior incidents on the basis that its prejudicial effect outweighs its probative value.¹⁰ Even though recidivism is high in other areas of crime, such as illicit drug use, no similar exception is permitted in those areas.¹¹

The court stated that the second rationale—the need to bolster the victim’s testimony because of a perceived general view that adult males simply would not sexually molest a child—is not a sufficient justification for the exception, because unfortunately we now “live in a world where accusations of child molest no longer appear improbable as a rule.”¹² Although expressing sympathy for child victims of sexual molestation, the court was unwilling to abandon a “basic tenet of criminal evidence law” that guards against conviction and punishment of individuals because of their bad character.¹³

Rejection of the “depraved sexual instinct” exception and adoption of Rule 404(b) certainly does not mean that evidence of prior sexual misconduct will always be excluded in sexual abuse cases. Although

6. *Id.* at 1339.

7. *Id.* The court’s willingness to adopt portions of the Federal Rules on a case-by-case basis is evident in earlier decisions. *See, e.g.,* Thomas v. State, 580 N.E.2d 224 (Ind. 1991) (addressing Rule 803(b)(3) and the admissibility of statements against penal interest); Modesitt v. State, 578 N.E.2d 649 (Ind. 1991) (rejecting the hearsay rule adopted in Patterson v. State, 324 N.E.2d 482 (Ind. 1975), in favor of portions of Rule 803(d)). In *Modesitt*, the court expressly stated that its ruling does not apply retroactively, and therefore some cases are still applying *Patterson*. *See, e.g.,* Schumpert v. State, 603 N.E.2d 1359, 1362-63 (Ind. Ct. App. 1992). *Cf.* Moran v. State, 604 N.E.2d 1258, 1260-62 (Ind. Ct. App. 1992) (adding that under *Modesitt*, testimony of a caseworker regarding a statement of a sexual abuse victim, offered during rebuttal to bolster the victim’s credibility, was inadmissible hearsay).

8. *Lannan*, 600 N.E.2d at 1335-37.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1337.

13. *Id.* at 1338.

evidence of prior acts can no longer be admitted to show action in conformity with the prior misconduct, it might be admissible for other purposes under Rule 404(b). Rule 404(b) provides:

(B) OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.¹⁴

After adopting Rule 404(b), the supreme court in *Lannan v. State* summarily concluded that evidence of the prior incident in Lannan's truck was not admissible under Rule 404(b).¹⁵ It is difficult to evaluate this conclusion absent a record of an attempt by the prosecution to fit the evidence within Rule 404(b). Although the "depraved sexual instinct" exception was available, the prosecutor obviously had little incentive to seek admission under Rule 404(b). However, the court's conclusion that the evidence was not admissible under Rule 404(b) "without forcing a square peg in a round hole"¹⁶ seems correct.

The new Indiana rule announced in *Lannan* will apply to cases pending on the date it was decided, October 16, 1992, and all cases thereafter. A case decided the same day as *Lannan*, *Pirnat v. State*,¹⁷ was remanded by the supreme court for reexamination in light of the holding in *Lannan*, because "Pirnat's appeal is currently pending as this new rule is announced."¹⁸ Presumably, much evidence of prior bad acts—formerly admissible under the "depraved sexual instinct" exception—will not be excluded under Rule 404(b), because the prosecution will be unable to fit such evidence under the "other purposes" provision of Rule 404(b).

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

15. *Lannan*, 600 N.E.2d at 1341. Cf. *Schumpert v. State*, 603 N.E.2d 1359, 1361-62 (Ind. Ct. App. 1992) (In applying Rule 404(b), the court held that evidence of several prior, similar robberies was admissible under "common scheme or plan" exception to prove identity).

16. *Id.*

17. 600 N.E.2d 1342 (Ind. 1992).

18. *Id.*

Attorneys representing the accused in criminal cases should take advantage of the notice provision in Rule 404(b), which was added to the Federal Rules of Evidence by a 1991 amendment. Pursuant to this provision, the prosecution "shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."¹⁹ However, the prosecution must provide notice only upon request by the accused.²⁰ Therefore, defense counsel in criminal cases should routinely make such a request at an early stage in the proceedings. In addition, upon learning of the prosecutor's intent to use evidence of prior bad acts, the defense counsel may want to file a motion in limine to challenge use of such evidence. When the accused properly requests notice of the prosecutor's intent to use evidence of prior bad acts, such evidence "is inadmissible if the court decides that the notice requirement has not been met."²¹ Although the notice provision in Rule 404(b) does not apply in civil cases, similar information is normally obtainable through discovery and other pretrial proceedings.

The Indiana Supreme Court's rejection of the "depraved sexual instinct" exception is a clear victory for the defense in criminal cases. However, the court's adoption of Rule 404(b) in *Lannan* is certainly not a defeat for the prosecution.²² Although the first sentence of Rule 404(b) clearly prohibits the use of prior crimes or bad acts "to show action 'in conformity therewith,'" this rule of exclusion is substantially undermined by the second sentence, which makes such evidence admissible for "other purposes."²³ The concern of the accused is that a creative prosecutor can frequently avoid the general prohibition and convince the court to admit evidence of prior crimes or bad acts under the guise of "other purposes," knowing that the jury may improperly use the evidence to establish guilt in the case. Certainly, evidence of prior crimes or bad acts makes the accused more "convictable" in the eyes of most jurors. Due to this significant danger of jury misuse of such evidence, the courts in Indiana should exercise caution in admitting such evidence under Rule 404(b).

19. FED. R. EVID. 404(b).

20. *Id.*

21. FED. R. EVID. 404(b) advisory committee's note.

22. Aside from the rejection of the "depraved sexual instinct" exception, the Indiana Supreme Court's adoption of Rule 404(b) will not substantially change the law in Indiana as developed through a series of cases. See *Gibbs v. State*, 538 N.E.2d 937 (Ind. 1989); *Penley v. State*, 506 N.E.2d 806 (Ind. 1987). See generally J. ALEXANDER TANFORD & RICHARD M. QUINLAN, INDIANA TRIAL EVIDENCE MANUAL § 48.9 (2d ed. 1987 & Supp. 1992).

23. FED. R. EVID. 404(b).

A 1991 report of the Trial Evidence Committee of the American Bar Association Section of Litigation addresses some of the problems in applying Rule 404(b).²⁴ According to the ABA report, the “greatest problem” with Rule 404(b) “is the tendency some courts have to permit prosecutors to rely on a ‘laundry list’ of reasons for offering other act evidence.”²⁵ The notice provision added in 1991 should help to alleviate this problem, because, if properly used by the defense in combination with a motion in limine, trial courts can require the prosecution to “articulate with precision the use it seeks to make of the evidence and the inferences it seeks to have the trier of fact draw.”²⁶ Other issues identified in the American Bar Association report relate to the appropriate standard of proof to apply in determining whether the prior act occurred, whether the judge or the jury determines if the prior act did in fact occur, and whether the other purpose for which the prior crime or bad act is offered must be in dispute.²⁷

Some of the above-mentioned issues have been addressed by the United States Supreme Court. The Court explained in *Huddleston v. United States*²⁸ that the threshold inquiry in determining the admissibility of the prior act under Federal Rule 404(b) “is whether that evidence is probative of a material issue other than character.”²⁹ In other words, the prosecution must show that the offered evidence is probative of one of the “other purposes” allowed by Rule 404(b). If the trial court determines that the prior act evidence is probative of a material issue other than character, it is important to note that it is still not relevant unless “the jury can reasonably conclude that the act occurred and the defendant was the actor.”³⁰ Under the Federal Rules of Evidence, such questions of relevance conditioned on fact are governed by Rule 104(b), which requires the trial court to admit the evidence “upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.”³¹ Therefore, the Court in *Huddleston* rejected the defense’s argument that evidence of a prior act is admissible only after the prosecution presents sufficient evidence for the court to make a preliminary finding that the act occurred based on the prepon-

24. David A. Schlueter, *Emerging Problems Under the Federal Rules of Evidence*, A.B.A. SEC. OF LIT. (2d ed. 1991).

25. *Id.*

26. *Id.*

27. *Id.*

28. 485 U.S. 681 (1988).

29. *Id.* at 686.

30. *Id.* at 689.

31. FED. R. EVID. 104(b).

derance standard.³² Rather, the trial court "simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence."³³ Rejection of a higher standard of proof, such as the clear and convincing evidence standard, was based on the Court's earlier decision in *Bourjaily v. United States*,³⁴ which held that preliminary factual findings under Federal Rule 104(a) are governed by the preponderance of the evidence standard.³⁵

Recognizing the concern that unduly prejudicial evidence might be introduced under Rule 404(b), the Court in *Huddleston* suggested that other sources provide sufficient protection against such unfair prejudice. The other sources of protection are:

first, . . . the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, . . . the relevancy requirement of Rule 402 — as enforced through Rule 104(b); third, . . . the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, . . .; and fourth, . . . Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.³⁶

The Court's recognition in *Huddleston* of Federal Rule 403's applicability is important in that it may provide the best defense against admission of prior crimes or bad acts under Rule 404(b).³⁷

Whether the prosecution can offer evidence of prior crimes or bad acts for "other purposes" that are not in dispute is not clear under Rule 404(b). The American Bar Association report suggests that "[a]s a general rule, . . . evidence of matters not disputed, especially prejudicial evidence, ought not to be readily accepted."³⁸ This view makes sense, particularly if one accepts the "basic tenet of criminal evidence law older than the republic itself [that prohibits] . . . the state from offering character evidence merely to show the defendant is a 'bad guy' and therefore probably committed the crime with which he is charged."³⁹

32. *Huddleston*, 485 U.S. at 685-89.

33. *Id.* at 690. See *Parker v. State*, 425 N.E.2d 628, 633 (Ind. 1981) (A prior act is admissible to prove identity "if the two incidents are sufficiently similar to support an inference that the same person committed both, and if the defendant is shown to have perpetrated the [prior act].").

34. 483 U.S. 171 (1987).

35. *Id.* at 176.

36. *Huddleston*, 485 U.S. at 691-92.

37. Indiana law is similar to Rule 403. See TANFORD & QUINLAN, *supra* note 22, §§ 48.4-48.6.

38. Schlueter, *supra* note 24.

39. *Lannan v. State*, 600 N.E.2d 1334, 1338 (Ind. 1992).

Requiring an actual dispute on the issue for which the prior acts evidence is offered under Rule 404(b) is consistent with *Burch v. State*,⁴⁰ in which the Indiana Court of Appeals held that evidence of identity is “highly relevant” when the accused relies upon an alibi defense.⁴¹ If an issue is not in dispute, then evidence relating to that issue cannot be “highly relevant.”

While the government is presenting its case in chief, it is sometimes unclear whether or not an issue will be contested. However, if the accused objects to the introduction of evidence under Rule 404(b), either at trial or in a pretrial motion in limine, the court can require the government to identify the specific issue for which the evidence is being offered and then ask the accused whether he or she contests the issue. Even if evidence is excluded during the government’s case in chief, it can be introduced later during rebuttal if the accused disputes the issue during his or her case in chief.

It is interesting to note that Indiana abandoned the “depraved sexual instinct” exception and adopted Rule 404(b) at the same time Congress is considering a bill⁴² that would add three new rules to the Federal Rules of Evidence providing for the admissibility of evidence of similar crimes, even if not charged, in sex offense cases and in child molestation cases and evidence of similar acts in civil cases concerning sexual assault or child molestation.⁴³ Actual admissibility under any of the three proposed rules would be subject to a determination of unfair prejudice under Rule 403.⁴⁴ These proposed additions to the Federal Rules of Evidence obviously represent a dissatisfaction with the limits imposed by Rule 404(b) and a view that there is sufficient justification for treating sexual offenses different from other offenses. Of course, adoption of the proposed Federal Rules of Evidence 413, 414, and 415 will not require Indiana to adopt similar rules, even if the Indiana Supreme Court generally adopts the federal rules.

A week after its decision in *Lannan*, the Indiana Supreme Court again demonstrated its willingness to adopt a federal rule of evidence.

40. 487 N.E.2d 176, 179 (Ind. Ct. App. 1985). See also *Schumpert v. State*, 603 N.E.2d 1359, 1362 (Ind. Ct. App. 1992) (holding that because the identity of the robber was not so firmly established by two eyewitnesses as to make additional identification evidence—several prior, similar robberies—unnecessary, it was properly admitted under Rule 404(b)).

41. *Burch*, 487 N.E.2d at 179.

42. S. 3271 and H.R. 5960, 102d Cong., 2d Sess. § 121 (1992), referred to as the Sexual Assault Prevention Act of 1992.

43. The proposed Federal Rules of Evidence are (1) Rule 413 (Evidence of Similar Crimes in Sexual Assault Cases); (2) Rule 414 (Evidence of Similar Crimes in Child Molestation Cases); and (3) Rule 415 (Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation).

44. FED. R. EVID. 403.

*Nunn v. State*⁴⁵ involved the accused's attempt to use a conviction, for which a pardon had been granted, to impeach one of the state's witnesses.⁴⁶ Referring to it as an issue of first impression, the court decided to adopt Rule 609(c)⁴⁷ and held that the trial court correctly refused to permit the impeachment.⁴⁸ In relevant part, Rule 609(c) provides:

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, . . . and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, . . . based on a finding of innocence.⁴⁹

The court determined that Rule 609(c) protects the purpose of a pardon—"to give a person a new start by blocking out the existence of guilt—[by] permitting impeachment by a pardoned conviction only in limited circumstances."⁵⁰ The state's witness in *Nunn* had lived a crime-free life after his release from probation and obtained a pardon in order to become a police officer.⁵¹

Application of the Indiana Rape Shield Statute⁵² in civil cases was addressed in *Barnes v. Barnes*.⁵³ In *Barnes*, the plaintiff sued her father for damages resulting from rape and sexual abuse when she was fifteen years old.⁵⁴ Relying on the Rape Shield Statute, the lower court excluded extensive evidence of prior sexual abuse of the plaintiff by persons other than her father.⁵⁵ At trial, the jury awarded the plaintiff compensatory damages of \$250,000 and punitive damages of \$3 million.⁵⁶ After concluding that the Rape Shield Statute does not apply in civil cases, the supreme court proceeded to address the relevancy of the prior sexual abuse.⁵⁷ The court concluded that the evidence was obviously relevant to issues presented in the case, including the plaintiff's claim that she

45. 601 N.E.2d 334, 337-38 (Ind. 1992).

46. *Id.* at 338.

47. *Id.*

48. *Id.*

49. FED. R. EVID. 609(c).

50. *Nunn*, 601 N.E.2d at 338.

51. *Id.*

52. IND. CODE § 35-37-4-4(a) (1988).

53. 603 N.E.2d 1337, 1342-45 (Ind. 1992).

54. *Id.* at 1337.

55. *Id.* at 1339.

56. *Id.*

57. *Id.* at 1342.

suffered post-traumatic stress disorder as a result of her father's attacks and the plaintiff's credibility in testifying against her father.⁵⁸ Because exclusion of the evidence was not harmless error, the judgment was reversed and the case remanded for a new trial.⁵⁹

There were other 1992 decisions in Indiana involving evidentiary issues, although they were of limited significance.⁶⁰ Consistent with *Lannan*, four recent cases of the Court of Appeals of Indiana adopted and applied FRE 404(b).⁶¹ Two cases of greater significance, were decided

58. *Id.* at 1343-44.

59. *Id.* at 1345. Another important issue in the case involved parental tort immunity. The court "conclude[d] that when, as here, a cause of action is predicated upon a claim of intentional felonious conduct and there is no issue of parental privilege, the doctrine of parental tort immunity will not apply to preclude the action." *Id.* at 1339-42.

60. See, e.g., *Barnes v. Barnes*, 603 N.E.2d 1337, 1346-47 (Ind. 1992) (holding that prior medical expense payments made by the defendant are not admissible under the collateral source statute; further, such payments constitute "advance payments" under IND. CODE § 34-3-2.5-1 (1988) and as such are not admissible as an admission of liability); *Pigg v. State*, 603 N.E.2d 154, 157 (Ind. 1992) (holding that the Sixth Amendment gives an accused the right to cross-examine a government informant concerning his address; however, the right is not absolute and, after an *in camera* hearing, the trial court might conclude the information should not be divulged if, for example, it is determined the witness would be in danger); *Sims v. State*, 601 N.E.2d 344, 346 (Ind. 1992) (holding that communication between the accused and his treatment center is privileged when the accused was ordered to attend and complete a treatment program as a term of probation in a prior case; admission of counselor's testimony amounted to self-incrimination in circumvention of the Fifth Amendment); *Chambers by Hamm v. Ludlow*, 598 N.E.2d 1111, 1117 (Ind. Ct. App. 1992) (holding that to qualify as an expert witness, the following elements must be established:

(1) the subject of the opinion or inference must be so distinctly related to some science, profession, business, or occupation as to be beyond the ken of laymen; and (2) the witness must have sufficient skill, knowledge, or experience in that field so as to make it appear that his opinion or inference will aid the trier of fact in his search for the truth.

Greathouse v. Armstrong, 601 N.E.2d 419, 425 (Ind. Ct. App. 1992) (holding that admission of evidence of other similar occurrences under substantially the same circumstances to prove the existence of a dangerous condition and notice thereof is left to the discretion of the trial court; remoteness and confusion are grounds for exclusion); *Liberty Nat'l Bank & Trust v. Payton*, 602 N.E.2d 530, 533 (Ind. Ct. App. 1992) (holding that authentication of an official record requires the custodian, by testimony or certification, to verify that the document is the original record or a true and accurate copy); *Sierp v. Vogel*, 592 N.E.2d 1253, 1254-55 (Ind. Ct. App. 1992) (holding that a leading question is "one which embodies a material fact and admits of a conclusive answer in the form of a simple 'yes' or 'no'"; question seeking a fact pertinent to a medical expert's practice was not a proper hypothetical question seeking an opinion and was therefore an improper leading question); *Spier by Spier v. City of Plymouth*, 593 N.E.2d 1255, 1259-60 (Ind. Ct. App. 1992) (deciding that a recorded statement of a deceased witness is hearsay and not admissible at trial unless it falls within an exception; therefore, a party resisting a motion for summary judgment cannot use the statement to create a factual dispute).

61. See *Moran v. State*, 604 N.E.2d 1258 (Ind. Ct. App. 1992); *Schumpert v.*

by the United States Supreme Court last term and are discussed below. Assuming Indiana adopts rules of evidence similar to the FRE, the federal courts' interpretation of the federal rules will provide guidance for the courts in Indiana.

Under the Federal Rules of Evidence, there are two categories of hearsay exceptions. One category is applicable only when the out-of-court declarant is unavailable at trial.⁶² Under the second category of hearsay exceptions the availability of the out-of-court declarant is immaterial.⁶³ Specifically, Rule 804(b)(1) creates an exception for the "former testimony" of an unavailable witness if the testimony was given under oath in another proceeding or in a deposition and "the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."⁶⁴

In *United States v. Salerno*,⁶⁵ the United States Supreme Court addressed the application of Rule 804 in a situation where the defendants wanted to introduce the grand jury testimony of two witnesses who asserted their Fifth Amendment rights at trial.⁶⁶ Since the witnesses had invoked the Fifth Amendment privilege, they were considered unavailable at trial.⁶⁷ The critical issue in *Salerno* was whether the Government had a "similar motive" to develop, in this case impeach, the testimony of these two witnesses at the grand jury proceedings.⁶⁸ The grand jury testimony was excluded by the trial court, but the court of appeals reversed, holding that "adversarial fairness" requires elimination of the "similar motive" requirement when the government obtains immunized testimony in a grand jury proceeding from a witness who refuses to testify at trial.⁶⁹ Refusing to rewrite Rule 804(b)(1) by creating an exception, the Supreme Court held that the defendants must show that the government had a "similar motive" to develop the testimony during the grand jury proceedings. The Court remanded the case for a determination of this issue.⁷⁰

State, 603 N.E.2d 1359 (Ind. Ct. App. 1992); *Sink v. State*, 605 N.E.2d 270 (Ind. Ct. App. 1993); *Vanover v. State*, 605 N.E.2d 218 (Ind. Ct. App. 1992).

62. FED. R. EVID. 804.

63. FED. R. EVID. 803.

64. FED. R. EVID. 804(b)(1).

65. 112 S. Ct. 2503 (1992).

66. *Id.*

67. See FED. R. EVID. 804(a)(1).

68. *United States v. Salerno*, 112 S. Ct. 2503 (1992).

69. 937 F.2d 797, 806 (2d Cir. 1991), *rev'd*, 112 S. Ct. 2503 (1992).

70. *Salerno*, 112 S. Ct. at 2509-12. In his dissenting opinion, Justice Stevens argued that because these witnesses' testimony was critical to the government's case and because the prosecutors had to doubt their veracity before the grand jury, there was clearly a "similar motive" to develop their testimony at the grand jury proceedings. *Id.*

The *Salerno* decision demonstrates the Court's refusal to ignore the express language of the Federal Rules of Evidence. Another case, *White v. Illinois*,⁷¹ demonstrates the Court's tendency to find that Constitutional concerns—in *White* the Confrontation Clause of the Sixth Amendment—are reflected in the Federal Rules of Evidence. White was charged with sexually assaulting a four-year-old girl.⁷² Within an hour of the event, the victim reported the sexual assault to her babysitter, her mother, and a police officer.⁷³ Later, the victim made statements concerning the alleged assault while being examined by medical personnel.⁷⁴ At trial, the prosecutor did not call the victim to testify.⁷⁵ Instead, each of the persons to whom the victim reported the event was called to testify as to what the victim had said.⁷⁶ The hearsay problem was cured by the Illinois equivalent of Rule 803(2) on excited utterances, and Rule 803(4) regarding statements made for purposes of medical diagnosis or treatment.⁷⁷ Thus, only the Confrontation Clause issue was before the Court in *White*. The Court in *White* held that because these statements qualified for admission under "firmly rooted" hearsay exceptions, they were not barred by the Confrontation Clause, even though there was no showing that the out-of-court declarant was unavailable at trial.⁷⁸

Although the decision in *White* governs the Confrontation Clause of the Sixth Amendment of the United States Constitution, it does not control the interpretation of the Confrontation Clause in the Indiana Constitution.⁷⁹ In addressing a related issue in *Brady v. State*,⁸⁰ the Indiana Supreme Court held that the use of a four-year-old child's videotaped testimony in a sexual abuse case, without the child hearing or seeing the accused, violates the "face-to-face" provision of the Indiana Constitution, even though it would not violate the Sixth Amendment of the United States Constitution, as interpreted by the United States Supreme Court in similar cases.⁸¹

In 1994, Indiana will join the majority of states (over thirty) that have adopted some version of the Federal Rules of Evidence or the very similar Uniform Rules of Evidence. While this will undoubtedly bring

71. 112 S. Ct. 736 (1992).

72. *Id.* at 739.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. FED. R. EVID. 803(2) and (4).

78. *White*, 112 S. Ct. at 741-42.

79. IND. CONST. art. I, § 13.

80. 575 N.E.2d 981 (Ind. 1991).

81. See *Maryland v. Craig*, 497 U.S. 836 (1990); *Coy v. Iowa*, 487 U.S. 1012 (1988).

some reform to the law of evidence in Indiana, even more importantly, the adoption of rules of evidence will facilitate access to the law. Furthermore, assuming Indiana adopts rules similar to the Federal Rules of Evidence, it will be easier for Indiana trial attorneys to move between the state courts and the federal courts.