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INDIANA'S PATTERSON RULE OF EVIDENCE: ITS EVOLUTION, MISAPPLICATION AND CORRECTION

I. INTRODUCTION

The traditional hearsay rule prohibits out-of-court statements from being introduced into evidence to prove the truth-of-the-facts asserted.[1] Indiana abandoned its adherence to the traditional evidence rule in *Patterson v. State*[2] when it permitted a witness' prior out-of-court statements to be admitted into evidence to prove the facts thus asserted.[3] As Indiana relaxed its restrictions on hearsay, federal courts simultaneously implemented formal rules, which in part related to restricting prior out-of-court statements made by witnesses.[4] Indiana's *Patterson* hearsay rule has therefore become one of the most liberal evidentiary rules in the United States today by allowing the virtually unrestricted admission of prior out-of-court statements into evidence.[5] The *Patterson* rule requires reform so that it will effective-

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1. When a statement is used to prove the "truth-of-the-facts-asserted," it is utilized to show that the content of the out-of-court statement is true rather than simply verifying that the prior statement was made. *See* C. MCMORMICK, MCCORMICK ON EVIDENCE § 251 (E. Cleary 2d ed. 1972).

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

3. C. MCCORMICK, *supra* note 1, at § 251. McCormick states that "the traditional view is that a prior statement of a witness is hearsay if offered to prove the happening of matters asserted therein. . . .[T]he prior statement is admissible as proof of the matters asserted therein, *i.e.* 'substantive' evidence, only when falling within one of the exceptions to the hearsay rule." *Id.* at 601.

4. The *Patterson* rule was handed down March 18, 1975. The Federal Rules of Evidence, 28 U.S.C. App. (1976), were approved by Congress on January 2, 1975. The effective date of the rules was July 1, 1975. FED. R. EVID. 801 (d)(1)(A) and (B) restricted the admission of both prior inconsistent and prior consistent statements. *See infra* notes 36-37 and accompanying text.

5. Only a minority of states other than Indiana have abandoned the traditional hearsay rule. Those states include California, Kansas, New Jersey, New Mexico and Oregon. These five states have accepted some from of FED. R. EVID. 801 to limit the admissibility of hearsay statements. These counterparts to the Federal Rules are found in CAL. EVID. CODE § 1236 (West Supp. 1982), KAN. STAT. ANN. § 60-460 (1982 Supp.), N.J. R. EVID. 63(1) (1967), N.M. STAT. ANN. § 801(d)(1) (1983). The Oregon evidentiary rules have not yet been codified. Other states instituting liberal hearsay rules include Kentucky, North Carolina, South Carolina and Wisconsin. Examples of their non-traditional hearsay rules can be found in Phillips v. Common wealth, ___ Ky.___, 600 S.W.2d 485 (1980), State v. Satterfield, ___ N.C. App.___, 218 S.E.2d 504 (1975), State v. Huggins, ___ S.C. ___, 269 S.E.2d 334 (1980), and Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609 (1969). These states have not adopted the Federal Rules of Evidence but many have imposed safeguards to ensure the reliability of out-of-court statements. *See infra* notes 268-78 and accompanying text.

ly prohibit unreliable hearsay from being introduced as substantive evidence.

The Patterson rule is a significant departure from Indiana's traditional rule of evidence. *Patterson* permits prior out-of-court statements made by a witness or party to be admitted into substantive evidence notwithstanding the fact there are no safeguards ensuring the reliability of the statement at the time it is originally made. In contrast to the traditional rules of evidence, under *Patterson* the declarant need not be under oath when the statement is first elicited. There is also no requirement that the declarant be subject to cross examination at the time the out-of-court statement was made. The only *Patterson* prerequisite to the admission of the prior out-of-court statement into evidence is that the declarant must be available at trial for cross examination.[6]

A liberal hearsay rule, such as the rule established in *Patterson*, creates a problem of insuring the reliability of the out-of-court statement.[7] To remedy the reliability problem, *Patterson* placed one restriction upon extrajudicial statements that were introduced in court as substantive evidence. That restriction required that the out-of-court declarant must be available in court for cross examination.[8]

Indiana courts quickly recognized that merely requiring the declarant's availability for cross examination was not sufficient to safeguard the reliability of the statement.[9] The Indiana Court of Appeals imposed several criteria that had to be met before the *Patterson* rule could be utilized.[10] Most of these safeguards have not been considered by the Indiana Supreme Court. Consequently, their validity is somewhat tenuous.[11]

The Indiana Supreme Court has not been as a active as the courts of appeals in establishing limitations to the *Patterson* rule. The Supreme Court of Indiana has added only one restriction to the *Patterson* rule since the rule was established. That court construed the *Patterson* rule as prohibiting the use of out-of-court statements as a

6. *Patterson*, 263 Ind. at 58, 324 N.E.2d at 484-85.

7. Hearsay is prohibited due to fear that the out-of-court asserter is not credible. Without proper safeguards, the more hearsay statements that are allowed into evidence, the greater the chance that unreliable evidence will be introduced into court. C. McCormick, *supra* note 1, at § 245.

8. *Patterson*, 263 Ind. at 58, 324 N.E.2d at 484-85.

9. *See infra* notes 186-214 and accompanying text.

10. *Id.*

11. *See infra* note 197.

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substitute for available in-court testimony.[12] Prior to adding that limitation, the Indiana Supreme Court permitted the *Patterson* rule to be used to substitute out-of-court statements for more reliable in-court testimony.[13] It overruled that prior decision to ensure that reliable evidence will be introduced into trial.[14]

The Indiana Supreme Court's restrictions on the admissibility of out-of-court statements are not sufficient to guarantee the reliability and credibility of hearsay before it is introduced into substantive evidence. The failure of the Indiana Supreme Court to restrict the rule to prevent unreliable hearsay from being introduced has resulted in prior statements being admitted without being effectively challenged by cross-examination.[15] Cross-examination is the only safeguard of statement reliability provided for in the *Patterson* rule.[16] Therefore, admitting into evidence out-of-court statements that cannot be effectively cross-examined permits hearsay evidence to be introduced at trial without any assurance of reliability. This is precisely the problem the traditional hearsay rule effectively prevented.[17]

The *Patterson* rule is problematic in its application and because it creates opportunities for hearsay abuse. The rule contains no safeguard against manufactured prior statements,[18] jury overvaluation of out-of-court statements,[19] irrelevant out-of-court statements,[20] or statements that do not lend themselves to effective cross examination.[21] Under the *Patterson* rule, unnecessary and unreliable statements may be admitted in court as substantive evidence.

In order to ensure the jury's receipt of reliable evidence, Indiana

12. Samuels v. State, 267 Ind. 676, 372 N.E.2d 1186 (1978). In *Samuels*, the *Patterson* rule was limited to prevent the admission of out-of-court statements that had previously been allowed under Flewallen v. State, 267 Ind. 90, 368 N.E.2d 239 (1977).

13. Flewallen v. State, 267 Ind. 90, 368 N.E.2d 239 (1977).

14. *Samuels*, 267 Ind. at 677, 372 N.E.2d at 1187. This decision, which creates the only limitation established upon the *Patterson* rule since its inception, was authorized by Justice Prentice who also wrote the original *Patterson* decision.

15. *See infra* notes 224-42 and accompanying text.

16. *Patterson*, 263 Ind. at 58, 324 N.E.2d at 484. In *Patterson*, the court held that the out-of-court declarant's availability for cross-examination is the safeguard of paramount importance and is adequate to ensure reliability.

17. *See* C. McCormick, *supra* note 1, at 602. The traditional hearsay rule prohibited out-of-court assertions from being used as substantive evidence. This rule had the effect of preventing unreliable evidence from being introduced into evidence.

18. *See infra* notes 255-56 and accompanying text.

19. *See infra* note 257 and accompany text.

20. *See infra* note 61 and accompanying text.

21. *See infra* notes 224-42 and accompanying text.

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must reform the *Patterson* rule. Certain minimal prerequisites should be added to the *Patterson* rule if Indiana is to continue permitting out-of-court statements to be introduced as substantive evidence.[22] The *Patterson* rule should be modified to include requisite criteria which out-of-court statements must meet before they may be introduced into evidence.[23] Extrajudicial statements should not be admissible for the sole purpose of bolstering in-court testimony.[24] A declarant should be required to testify in court about the subject matter of the statement and affirm its veracity before the statement is admitted into evidence.[25] Finally, the statement should pass all the admissibility requirements of in-court testimony, including the necessity of first hand knowledge.[26] These prerequisites are essential to ensure the relevancy of the out-of-court statements and guarantee the declarant's availability for effective cross examination, thereby promoting the statements' reliability.

As a final safeguard to prevent unreliable hearsay from finding its way into substantive evidence, the trial court should be given discretion to restrict unreliable and highly prejudicial out-of-court statements even if the proposed prerequisites are met.[27] The trial court should impose a balancing test upon out-of-court statements to determine whether the value of the hearsay outweighs its negative effects. Such judicial scrutiny will act as a continuous safeguard against new methods of introducing unreliable prejudicial substantive evidence before the jury.

II. THE HISTORY OF HEARSAY EVIDENCE, 1500—1975

A historical perspective of hearsay will provide a proper analytical framework for the proposed reforms of Indiana's current evidentiary law. The traditional evidentiary rules concerning hearsay were developed very early in the common law. Juries first began to receive evidence from in-court testimony of witnesses in 16th Century England.[28] Initially, courts did not distinguish hearsay statements

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22. *See infra* notes 188-207 and accompanying text.
23. *See infra* notes 287-98 and accompanying text.
24. *See infra* notes 255-56 and accompanying text.
25. *See infra* notes 188-89 and accompanying text.
26. *See infra* notes 295-97 and accompanying text.
27. *See infra* notes 298-99 and accompanying text.
28. 5 WIGMORE ON EVIDENCE § 1364 (J. Chadbourn Rev. 1974). Prior to the 1500's, jurors were able to collect evidence randomly throughout the town and talk with friends of the parties to the litigation. *Id.*

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from in-court testimony and allowed both to be introduced into evidence.[29] Throughout the 1500's and early 1600's, hearsay statements were consistently received by courts over the opposing party's objection to their introduction.[30] As the English common law developed in the 1600's, trial judges began to note that hearsay statements were often insufficient and questionable evidence.[31] Eventually, judges exercised their discretion and excluded some forms of hearsay.[32] Exclusion of hearsay statements from persons not called to testify in court was part of the judicial doctrine developing between 1675 and 1690.[33] The English courts also considered hearsay statements insufficient to create a foundation for a conclusion of fact and only allowed hearsay statements to be used to confirm or corroborate other testimony.[34]

In the early 1700's, the trend in England began to move toward excluding hearsay altogether.[35] By the mid 18th century, all hearsay was deemed inadmissible and the new task confronting courts was the establishment of specific exceptions to the hearsay prohibition.[36] The trend during early 19th century England was to admit prior consistent statements made by the declarant after the credibility of the declarant's testimony was attacked by the opposing party. However, a witness' prior consistent statements elicited from direct examination were not allowed to be introduced as substantive evidence in the case-in-chief.[37]

Until 1953, United States federal courts and individual state

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29. *Id.* at 17.

30. *Id.*

31. *Id.* at 18.

32. *Id.* at 18. The appreciation of the impropriety of using hearsay statements of persons who did not testify steadily grew and eventually resulted in the exclusion of some hearsay. *See, e.g.*, Colledge's Trial, 8 How. St. Tr. 549, 603 (1681), in which the attorney general himself, during a prosecution for seditious publication, stops a prosecution witness from stating what the defendant printer said as to authority. Another counsel for the prosecution later did the same, stating, "We must not permit this for example's sake, to tell what others said." *Id.* at 628, *cited in* 5 WIGMORE ON EVIDENCE, *supra* note 28, at 19 n.32.

33. 5 WIGMORE ON EVIDENCE, *supra* note 28, at 18.

34. *Id.* at 19. Hearsay was allowed as a mere supplement to other good evidence already admitted into evidence. *See, e.g.*, Knox's Trial, 7 How. St. Tr. 763, 790 (1679), *cited in* 5 WIGMORE ON EVIDENCE, *supra* note 28, at 19 n.33. (L.C.J. Scroggs: "The use you make of [the witness' former statement] is no more but only to corroborate what he hath said, that he told it to him while it was fresh and that it is no new matter of his invention now.").

35. 5 WIGMORE ON EVIDENCE, *supra* note 28, at 20.

36. *Id.*

37. Graham, *Prior Consistent Statements: Rule 801 (d)(1)(b) of the Federal Rules of Evidence, Critique and Proposal*, 30 HASTINGS L.J. 575, 578 (1979).

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courts followed the example established in England and staunchly prohibited the introduction of consistent and inconsistent prior statements into evidence to prove the truth-of-the-facts asserted. However, in 1953 the Uniform Rules of Evidence,[38] were adopted by the American Bar Association and the National Conference of Commissioners on Uniform State Laws.[39] Uniform Rule 63(1) was a significant break from the traditional common law hearsay rule utilized at that time. Rule 63(1) admitted prior out-of-court statements as substantive evidence as long as the declarant was present at the hearing and available for cross-examination when the prior statement was admitted.[40] However, states didn't readily accept the Uniform Rules.[41] States that did utilize Uniform Rule 63(1) often attached severely limiting prerequisites to it.[42] Meanwhile, the vast majority of state and federal courts adhered to the traditional hearsay policy of prohibiting prior statements from being introduced in direct examination as substantive evidence in the case-in-chief.[43]

Indiana courts continued to follow the traditional view through 1974, prohibiting out-of-court statements from being admitted as substantive evidence.[44] Like other traditional hearsay jurisdictions,

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38. UNIF. R. EVID. 63 (1953) is a direct counterpart to FED. R. EVID. 801. The former deals with hearsay as follows: "Evidence of a statement which is made other than by the witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay and inadmissible except: (1) Previous Statements of Persons Present and Subject to Cross-Examination. A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by the declarant while testifying as a witness; . . . " *Id.*

39. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SIXTY-SECOND YEAR, 161 (1953).

40. *See supra* note 38.

41. C. MCCORMICK, *supra* note 1, at 601, n.64.

42. *See* CAL. EVID. CODE § 1236 (West Supp. 1982). *Accord* N.J. R. EVID. 63 (1967).

43. *See, e.g.*, Gelhaar v. State, 41 Wis. 2d 230, 233, 163 N.W.2d 609, 612 (1969) ("The general rule is almost universally recognized that evidence of extrajudicial statements made by a witness who is not a party and whose declarations are not binding as admissions is admissible only to impeach or discredit the witness, and is not competent as substantive evidence of the facts to which such statements relate."). California, Kansas, New Jersey, New Mexico and Oregon have abandoned the traditional hearsay rule excluding out-of-court statements from substantive evidence and have adopted some form of the Federal Rules of Evidence. Indiana, Kentucky, North Carolina, South Carolina and Wisconsin have not adopted the Federal Rules of Evidence. The remaining 40 states have essentially maintained the traditional rules of evidence. *See supra* note 5.

44. *See, e.g.*, Hogan v. State, 235 Ind. 271, 132 N.E.2d 908 (1956) (court rejected police officer's testimony about out-of-court statement he received from declarant

they wanted to safeguard the jury from making a decision based upon unreliable evidence. The courts persisted in demanding that a statement be received in court as proof of the truth-of-the-facts asserted only after that statement was made upon the witness stand, subject to the test of cross-examination.[45]

Indiana and other traditional states which prohibited prior statements from being used as substantive evidence stood in sharp contrast to states with more liberal hearsay admission standards.[46] This disparity created the need for an established federal evidentiary policy.[47] In 1965, Congress authorized the formation of a Judicial Conference headed by the Chief Justice of the United States Supreme Court.[48] The purpose of this conference was to formulate suggestions for new federal evidentiary rules that would create a federal standard for the use of evidence in federal courts.[49]

Some members of the conference were concerned about the problems created by Uniform Rule 63(1), allowing all prior statements to be admitted as substantive evidence as long as the declarant was available for cross-examination.[50] The United States House of Represen-

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who denied the veracity of statement at trial); Diblee v. State, 202 Ind. 571, 177 N.E. 261 (1931) (court prohibited police officer from testifying about the substance of prosecution's consistent out-of-court assertion); Parker v. State, 196 Ind. 534, 149 N.E. 59 (1925) (court prevented counsel from reading a refuted statement of admission to witness in the jury's presence). *See generally* L. EWBANKS, A TREATISE ON THE RULES OF EVIDENCE –TRIAL OF CASES, CIVIL AND CRIMINAL IN THE COURTS OF INDIANA (1902).

45. *See* Harvey v. State, 256 Ind. 473, 269 N.E.2d 759 (1971) *See also* 5 WIGMORE ON EVIDENCE, *supra* note 28, at § 1361.

46. *See supra* note 43.

47. Federal courts followed the traditional hearsay rules. Douglas v. Alabama, 380 U.S. 415 (1965) (court reversed conviction where prior out-of-court statement was allowed into evidence and out-of-court declarant refused to testify on grounds of self-incrimination). *Accord* Bruton v. United States, 391 U.S. 123 (1967) (court found it reversible error to allow prior out-of-court statements to be read into evidence when witness refused to be cross-examined on the statement—fact that witness conceded making the prior statement did not change its inadmissibility). As more states abandoned the traditional hearsay rule, federal courts came under increasing pressure to update their evidentiary rules.

48. Congress authorized the creation of the Judicial Conference of the United States pursuant to 28 U.S.C. § 331 (1966). The purpose of the Conference was to formulate rules of evidence for the federal courts. S. Rep. No. 1277, 93d Cong., 2d Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051.

49. The Judicial Conference was given the job of establishing a firm evidentiary policy independent of the rules of evidence followed by the states. *Id.*

50. COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, H.R. DOC. NO. 46, 93d Cong., 1st Sess. 12 (1973) ("Not everyone agrees with Wigmore that 'Cross-examination is beyond doubt the greatest legal engine ever invented for the discover of truth.' There needs to

tatives was also concerned about the liberal position taken in the Uniform Rules. The House placed firm restrictions upon the evidentiary rule proposals submitted to its committee by the rules conference.[51] These restrictions took the form of amendments which were subsequently incorporated into the submitted rules. The House amended the rules regarding the admissibility of prior out-of-court statements, believing that safeguards were necessary to insure reliability. To be admissible, the prior statement must have been given both under oath and in a formal proceeding in which the declarant was subject to cross-examination.[52]

The Senate disagreed, believing that these severe limitations on the admissibility of prior out-of-court statements were unnecessary.[53] The declarant would be under oath as a witness during the trial when he qualified or verified the prior statement thus satisfying the oath requirement.[54] Furthermore, the jury could observe the witness' demeanor at the time the subsequent statement was made and thereby determine the witness' veracity.[55] Finally, the Senate stressed that the witness would be on the stand and subject to cross-examination regarding both the prior out-of-court statement and the in-court statement.[56]

The merger of the Senate, House and Judiciary views on hearsay evidence is manifested in the Federal Rules of Evidence, Article

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be effective accomodation between oath, personal demeanor before the trier-of-fact, and cross-examination to assure statement reliability.") [hereinafter cited as REPORT OF THE JUDICIAL CONFERENCE].

51. H.R. REP NO. 650, 93d Cong., 2d Sess. 4, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 7051, 7086. In its discussion of Rule 801 (d)(1) as it applies to a witness' prior inconsistent statements, the report stated that the "[R]ule as amended draws a distinction between types of prior inconsistent statements and allows only those made while the declarant was subject to cross-examination at a trial or hearing or in a deposition, to be admissible for their truth." *Id.* Prior to the House Report, the Judicial Conference placed no restrictions upon prior out-of-court statements, not even the requirement of cross-examination. *Id.*

52. *Id.*

53. S. REP. NO. 1277, 93d Cong., 2d Sess. 4, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 7051, 7062 ("The House severely limited the admissibility of prior inconsistent statements by adding a requirement that the prior statement must have been available for cross-examination.").

54. *Id.*

55. *Id.* The Senate Report stated that the later in-court testimony would allow the jury to determine the veracity of both the in-court statement and the prior out-of-court statement by observing only the witness' demeanor during the giving of the in-court statement.

56. *Id.*

VIII.[57] Federal Rule 801 incorporates the safeguards upon prior out-of-court statements requested by the House.[58] Rule 801(d)(1)(A)requires that all prior inconsistent statements must be given under oath and subject to cross examination before they are admissible.[59] Rule 801(d)(1)(B) allows prior consistent statements to be introduced at trial only if they are offered as rebuttal to a charge that the witness' in-court statement was recently fabricated or the product of improper influence or motive.[60] In 1975, federal courts implemented the new rules of evidence and prohibited the introduction of any out-of-court statements not meeting the new criteria.[61]

While federal courts revamped their evidentiary rules by replacing the traditional standard with a more liberal one, Indiana changed its position on the admission of out-of-court statements by establishing one of the most liberal hearsay rules ever adopted by a state.[62] While the Federal Rules are more liberal in introducing prior out-of-court statements than the traditional standard, they are substantially more

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57. 28 U.S.C. §§ 801-806 App. (1976). This statute was approved by Congress on January 2, 1975 and placed into effect July 1, 1975.

58. *See supra* note 51.

59. FED. R. EVID. 801 (d)(1)(A) states: "A statement is not hearsay if—(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition. . . ."

60. FED. R. EVID. 801 (d)(1)(B) states: "A statement is not hearsay if—(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (B) consistent with his testimony and if offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive. . . ."

61. United States v. Weil, 561 F.2d 1109 (4th Cir. 1977) (court prohibited the admission of prior consistent statements into evidence unless testimony to be bolstered was first impeached); United States v. Navarro-Varelas, 541 F.2d 1331 (9th Cir. 1976) (court excluded tape recording of interview with federal agent which was offered to prove the prior statement was consistent, since opposing party had not attacked the in-court testimony as a recent fabrication).

62. Prior to 1975, Indiana did not allow prior statements to be used to prove the truth-of-the-facts asserted. *See, e.g.*, Harvey v. State, 256 Ind. 473, 269 N.E.2d 473 (1971); Ketcham v. State, 240 Ind. 107, 111, 162 N.E.2d 247, 249 (1959); Diblee v. State, 205 Ind. 571, 177 N.E. 261 (1931); Parker v. State, 196 Ind. 534, 149 N.E. 59 (1925). Beginning with Skaggs v. State, 260 Ind. 180, 293 N.E.2d 781 (1973), the Supreme Court of Indiana, when considering whether to exclude hearsay statements, began to distinguish between instances where the declarant is available for cross-examination from instances where the declarant is not available for cross-examination. The evidence that was admitted in *Skaggs*, however, was found to be non-hearsay and, therefore, the admission of hearsay available for cross-examination was not addressed.

restrictive on out-of-court assertions than are the Uniform Rules.[63] In contrast, Indiana's hearsay rule is more liberal than the Uniform Rule in this context because the Indiana rule does not require that the out-of-court statement meet the admissibility standards of in-court testimony.[64] The Supreme Court of Indiana overruled its longstanding adherence to the traditional standard of restricting out-of-court statements from substantive evidence in *Patterson v. State*.[65]

The question raised before the appellate court in *Patterson*[66] was the admissibility of two signed pretrial statements given to the police by eyewitnesses.[67] The court found that the defense counsel had confronted one of the prosecution's witnesses with excerpts from her prior statement in an attempt to impeach her credibility.[68] The court found that the prosecution's purpose in introducing the prior out-of-court statement was not to prove the truth-of-the-facts asserted in the statement but only to place the partial statement in its proper context.[69] The appellate court held that where a portion of a statement is introduced into evidence, the adverse party is entitled to prove the remainder.[70]

The appellate court found an additional reason to allow the prior

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63. FED. R. EVID. 402 prohibits the admission of any evidence that is not relevant. FED. R. EVID. 602 prohibits the admission of testimony where the declarant does not have first hand knowledge. FED. R. EVID. 801(d)(1) requires that prior inconsistent statements must be made under oath with the declarant available for cross-examination and prior consistent statements may only be offered to rebut charges of fabrication or influence providing the declarant is available for cross-examination.

In contrast to the number of prerequisites established by the Federal Rules for out-of-court statements, UNIF. R. EVID. 63(1) only requires that a prior statement be admissible if made by the declarant while testifying as a witness and that the declarant be present at the hearing and available for cross-examination with respect to the statement.

64. Indiana's hearsay rule after *Patterson* is even more liberal than the Uniform Rules of Evidence because its only requirement for the admissibility of out-of-court statements is that the declarant must be available for cross-examination. There is no requirement that the statement must be relevant, as is found in the Uniform Rules and the Federal Rules. Nor is there a requirement that the declarant must have first hand knowledge of the event, which is required in the Federal Rules.

65. 263 Ind. 55, 324 N.E.2d 482 (1975).

66. Patterson v. State, ____ Ind. App. ____, 314 N.E.2d 92 (1974).

67. *Id.* at 97.

68. *Id.* at 97.

69. *Id.* at 98.

70. *Id.* at 97. The appellate court cited Shelby Nat'l Bank Adm'r v. Miller, 147 Ind. App. 203, 220, 259 N.E.2d 450, 469 (1970) ("Where a portion of a statement or conversation is placed into evidence, the adverse party is entitled to prove the remainder.").

statement into evidence. The witness's prior out-of-court statement to the state officer was inconsistent with her in-court statement. The state was unprepared for the in-court testimony of its witness. The appellate court held that the state was correct in introducing the prior statement for the purpose of impeaching its witness' credibility.[71] Therefore, the appellate court utilized the traditional hearsay rule and held that the prior statements were properly introduced into evidence for purposes other than to prove the truth of the asserted facts.[72]

The Supreme Court of Indiana reviewed *Patterson* using an approach that conflicted with the findings of the court of appeals.[73] The Supreme Court found the prior out-of-court statement of the witness was consistent with the subsequent in-court statement.[74] However, the Supreme Court viewed the witness' prior statement as somewhat more incriminating because it disclosed more facts.[75] The question established and addressed by the Indiana Supreme Court was whether it was reversible error for the trial court to fail to issue jury instructions limiting the use of the out-of-court statement to impeachment purposes only.[76]

The Supreme Court declared that *Patterson* would denote "a clear pronouncement of our departure from an ancient application of the hearsay rule . . ."[77] The court premised this departure from the traditional hearsay rule upon authority derived from *Harvey v. State*[78] and *Skaggs v. State*.[79] The *Patterson* court cited dicta from *Harvey* for the proposition that the primary rationale underlying the exclusion of hearsay is that it is insusceptible to the test of cross-examination.[80] The

71. Patterson v. State, ___ Ind. App. ___, 314 N.E.2d 92, 98 (1974).

72. *Id.*

73. Patterson v. State, 263 Ind. 55, 324 N.E.2d 482 (1975).

74. *Id.* at 58, 324 N.E.2d at 484.

75. *Id.*

76. *Id.*

77. *Id.* The full quotation reads: "We go first to the 'hearsay evidence' issue as it is that issue that occasioned the grant of transfer, in hopes of making a clear pronouncement of our departure from an ancient application of the hearsay rule—one that we have more recently determined to be a misapplication."

78. 256 Ind. 473, 269 N.E.2d 759 (1971).

79. 260 Ind. 180, 293 N.E.2d 781 (1973).

80. *Patterson*, 263 Ind. at 57, 324 N.E.2d at 484. The *Patterson* court used dicta from *Harvey* to support its holding that the primary reason for excluding hearsay is its insusceptibility to cross-examination. The dicta referred to states: "Dunn's testimony suffers from all the defects of hearsay testimony. Adam's, the out-of-court declarant, was not under oath, not subject to confrontation by the trier-of-fact, and most importantly, not subject to cross-examination by the accused when he made his statements to Dunn." *Harvey*, 256 Ind. at 477, 269 N.E.2d at 761. Somehow, the *Pat-*

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court then applied *Skaggs* for the proposition that prior out-of-court statements have previously been excluded from evidence in Indiana because the out-of-court declarant was unavailable for cross-examination.[81] The *Patterson* court used the *Skaggs* distinction between declarants who are available for cross-examination and those who are unavailable as authority to admit prior out-of-court statements where the declarant is available for cross-examination.[82]

The Indiana Supreme Court erroneously applied the reasoning developed in *Skaggs*, which was limited to the distinct factual situation confronted by the *Skaggs* court. The prior out-of-court statement introduced into evidence in *Skaggs* was a recitation of one of the terms of employment for a police department informant.[83] The *Skaggs'* statement was not used to prove the truth-of-a-fact asserted, as distinguished from such use of the prior statement in *Patterson*, but only to establish a factual term of employment. The statement admitted into evidence in *Skaggs* does not fall within the definition of hearsay adopted by the Supreme Court of Indiana.

> Hearsay evidence is testimony in court, or written evidence, of a statement made out-of-court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.[84]

Therefore, *Patterson* utilized the court's language which allowed the admission of an out-of-court statement when a declarant is available for cross-examination and which prohibited the admission of such a statement when a declarant is unavailable for cross-examination. The

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terson court interpreted that quote to justify dropping all safeguards and limitations on the admission of hearsay statements except for the defendant's availability for cross-examination.

81. *Patterson*, 263 Ind. at 57, 324 N.E.2d at 484.

82. *Id.* "In *Skaggs*, we distinguished prior cases wherein the out-of-court assertions had been excluded, the distinction being in such cases, the out-of-court asserter was not available for cross-examination. We made no attempt, however, to deal with prior cases. . . ." *Id.*

83. *Skaggs*, 260 Ind. at 185, 293 N.E.2d 784. "[I]n the case at bar we do not have a self-serving declaration. The evidence that a police official purported to give [the informant] permission to use marijuana to facilitate his undercover work is a statement of fact submitted by the state . . . It is merely a recitation of one of the facts under which [the informant] was working for the police department." *Id.*

84. This definition of hearsay, taken from C. McCORMICK, *supra* note 3, at 584, has been quoted in many Indiana cases including *Patterson*, 263 Ind. at 57, 324 N.E.2d at 484, and *Harvey*, 256 Ind. at 476, 269 N.E.2d at 760.

Patterson court then used this distinction, which arose in a non-hearsay context, as the basis for abandoning the traditional hearsay rule.

By developing the dicta in *Harvey* and creatively interpreting the holding in *Skaggs*, the Indiana Supreme Court established in *Patterson* a new hearsay rule for Indiana. After *Patterson*, out-of-court assertions were to be admitted into evidence for substantive purposes so long as one condition was met: the out-of-court declarant was available for cross-examination at the time the statements were introduced in court as substantive evidence.[85] The *Patterson* court held that the declarant's availability for cross-examination was sufficient to remedy any hearsay dangers and therefore prior out-of-court statements of an available declarant could not be excluded from evidence.[86]

III. THE PATTERSON RULE STATES THAT CROSS-EXAMINATION ALONE WILL REMEDY THE UNRELIABILITY OF OUT-OF-COURT STATEMENTS

The *Patterson* court's premise that cross-examination eliminates the hearsay dangers in out-of-court statements, must be examined in greater depth to determine its validity. It is important to note that there is a major difference in the value of cross-examination upon prior inconsistent out-of-court assertions and its value upon prior consistent out-of-court assertions.[87] Cross-examination of the witness in relation to a prior inconsistent statement affords the cross-examiner the opportunity to question the prior statement's underlying basis and purpose and to scrutinize the justification for the current contrary in-court statement.[88] Inquiries into the underlying reasons for conflicting statements disclose the sources of the change and are apt to reveal which statement, if any, is true.[89] However, the propriety of

85. *Patterson*, 263 Ind. at 57, 324 N.E.2d at 484.

86. 263 Ind. at 58, 324 N.E.2d at 485. The *Patterson* theory that availability for cross-examination eradicates hearsay dangers is in accord with Wigmore, McCormick, the Uniform Rules of Evidence and the Model Code of Evidence. The *Patterson* court justified abandoning all other hearsay safeguards based upon these authors and model rules.

87. McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573 (1947).

88. *Id.* at 577. ("[T]he witness who has told one story aforetime and another today has opened the gates to all the vistas of truth which the common law practice of cross-examination and re-examination were invented to explore.").

89. *Id.* ("It will go hard, but the two questioners will lay bare the sources of the change of face, in forgetfulness, carelessness, pity, terror or greed, and reveal which is the true story and which is false.").

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admitting consistent out-of-court statements as substantive evidence is of primary concern.[90]

When prior consistent out-of-court statements are offered into evidence for substantive purposes, they are rejected in most jurisdictions.[91] The reasons for excluding out-of-court statements are agreed upon by both *Patterson* advocates[92] and traditional hearsay advocates alike.[93] "The rule against hearsay seeks to ensure the reliability of evidence by excluding testimony when the declarant's credibility cannot be tested."[94] The differences between traditional hearsay states and liberal hearsay jurisdictions such as Indiana are found in the conflicting methods these jurisdictions employ to eradicate the danger of unreliable out-of-court assertions.

The *Patterson* court's statement that cross-examination eliminates all the dangers of hearsay is not universally accepted.[95] Other protective requirements are traditionally placed upon testimony to encourage witnesses to tell the truth.[96] These safeguards also give the jury an

90. More detailed discussion of prior inconsistent statements is beyond the scope of this note. For further discussion regarding this topic, see Bein, *Prior Inconsistent Statements: The Hearsay Rule, 801 (d)(1)(A) and 803 (24)*, 26 U.C.L.A. L. REV. 967 (1979) (limitations that should be placed upon admission of prior inconsistent statements); Baker, *The Right to Confrontation, the Hearsay Rules, and Due Process—A Proposal for Determining When Hearsay May be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974) (proposes brief due process hearings when hearsay evidence is offered as evidence); Beaver and Biggs, *Attending Witnesses' Prior Declarations as Evidence: Theory vs. Reality*, 3 IND. LEGAL F. 309 (1970) (problems created by admitting hearsay evidence); McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573 (1947) (positive aspects of the admission of prior inconsistent statements).

91. *See supra* note 43 and accompanying text.

92. Arnold v. State, ___ Ind. App. ___, 383 N.E.2d 461, 463 (1978) ("[Hearsay] . . . has as its basis, a fear that the out-of-court statement may be unreliable.").

93. C. MCCORMICK, *supra* note 1, at § 245. Hearsay usually invokes the fear of the credibility of the testimony. Safeguards help ensure the reliability of the evidence. *Id.*

94. Comment, *Evidence—Hearsay and Confrontation*, 27 S.C. L. REV. 257, 259 (1975).

95. Younger, *Reflections on the Rule Against Hearsay*, 32 S.C. L. REV. 281, 282 (1980). What the hearsay law gives the adversary is protection, not against uncross-examined evidence, but against unreliable evidence. The sole assurance of reliability is not cross-examination. Cross-examination is only one tool to ensure reliability.

96. *See* C. MCCORMICK, *supra* note 1, at § 245. *See also* Beaver and Biggs, *supra* note 90, at 316. An out-of-court statement may be admitted as substantive evidence if it is classified as a spontaneous statement, a contemporaneous statement, or a declaration against interest. Some subjective psychological quality of the declarant or objective condition of the surrounding circumstances supply the test of trustworthiness. *Id.*

excellent opportunity to determine the declarant's veracity. The requirements of an oath and a jury's observation of the declarant's in-court testimony are two examples of well established safeguards placed upon substantive evidence.[97] Traditionalists hold that these safeguards on in-court testimony, combined with cross-examination, are necessary to ensure that the jury receives reliable evidence.[98] The initial problem is whether all three safeguards listed above are necessary to ensure reliable testimony. Another problem is determining what foundational requirements are necessary for effective cross-examination.

Those jurisdictions which allow out-of-court statements into evidence to prove the truth-of-the-facts asserted do not require that all such safeguards be utilized.[99] Some proponents of the admission of hearsay stress that a prior statement should be made under oath.[100] The safeguard of oath has been viewed as an important tool to instill in the witness a feeling of special obligation to tell the truth.[101] It also impresses upon the witness the sanction of criminal punishment for perjury if the truth is not disclosed.[102] Most state and federal courts affirm the importance of an oath by requiring that all in-court testimony be given under oath.[103]

Some authorities discard the importance of a prior out-of-court statement being made under oath, as do some states which allow hearsay to be admitted into substantive evidence.[104] These courts hold that

97. *See* C. McCORMICK, *supra* note 1, at 581.

98. *Id.*

99. *See* FED. R. EVID. 801 (d)(1)(A) (requiring declarant to be available for cross-examination in addition to requirement of oath); FED. R. EVID. 801 (d)(1)(B) (requiring declarant to be available for cross-examination and restricting statement to be introduced only as rebuttal to charge of fabrication or improper influence or motive). *See also* Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609 (1969) (requiring declarant to be available for cross-examination and requiring that declarant have first hand knowledge of event in question).

100. *See* McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 TEX. L. REV. 573 (1947); FED. R. EVID. 801 (d)(1)(A); State v. Parish, 79 N.C. 610, ____ (1878) ("[I]t was unnecessary and mischievious to encounter the court and oppress the defendant with his garrulousness out-of-court statement and when not under oath.").

101. *See* C. McCORMICK, *supra* note 1, at 582. *Accord* N.J. R. EVID. 63 (1)(a)(ii) (1967).

102. *See* C. McCORMICK, *supra* note 1, at 582.

103. FED. R. EVID. 603 states, "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

104. 5 WIGMORE ON EVIDENCE, *supra* note 28, at 10. ("It is clear beyond a doubt that the oath, as thus referred to, is merely an incidental feature customarily accompanying cross-examination . . ."). *See also Gelhaar*, 41 Wis. at 234, 163 N.W.2d at 612.

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the purpose and effectiveness of oaths was historic and not applicable to ensure reliability in today's courts.[105] Opponents of the oath requirement contend that even if the oath were to adequately ensure the reliability of out-of-court statements, such a requirement is unnecessary. When a witness is on the stand and testifying about an out-of-court assertion that witness is under oath. Therefore, the reliability of the in-court statement ensures the reliability of the consistent out-of-court statement.[106] Though the liberals' view of an oath's importance has been shown to be inappropriate in some instances,[107] this theory is nonetheless one justification for requiring only cross-examination as a safeguard for hearsay reliability.

If one accepts the liberal hearsay rule proponents' view that an oath is not an essential safeguard to ensure that out-of-court statements are reliable, the next logical inquiry is whether observation of the witness' demeanor is necessary. More particularly, the question becomes one of whether the jury's observation of the witness, while that witness makes an in-court statement, is sufficient or necessary to ensure the reliability of the out-of court statement.[108] Those who stress the value of witness demeanor hold that the solemnity of the court setting and the possibility of public disgrace will impress upon the witness the necessity for telling the truth.[109] Personal presence also ensures that the reporting of an oral statement is done accurately.[110] The declarant's presence before the jury, contemporaneous with his statement, allows the jury to observe the declarant's demeanor so that they may more accurately determine the

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Accord KAN. STAT. ANN. § 60-460 (1976); CAL. EVID. CODE § 1236 (West 1966); N.J. R. EVID. 63 (1967).

105. 5 WIGMORE ON EVIDENCE, *supra* note 28, at § 1364. Originally, the sworn statement was seen as imperative to ensure the reliability of out-of-court assertions. By 1696 the importance of cross-examination was realized; subsequently, neither prior sworn nor unsworn statements could be admitted into evidence without the right of cross-examination.

106. *See supra* note 53. The senate committee could not justify the necessity of oath in admitting out-of-court statements when the only hearsay exception that required oath was former testimony.

107. *See* Torrence v. State, 263 Ind. 202, 328 N.E.2d 214 (1975), in which a witness testified against the defendant in court and subsequently issued a written statement refuting his in-court testimony. At a post-conviction hearing the statement was admitted via the *Patterson* rule, although the witness testified that he was not afraid of perjuring himself in an affidavit because the notary never made him swear to the affidavit's truth.

108. *See* C. MCCORMICK, *supra* note 28, at 582.

109. *Id.*

110. *Id.*

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sincerity and veracity of the statement.[111] Without the declarant's presence contemporaneous with his statement the jury is unfairly required to rely upon the witness' perception and memory of his sincerity at the time the out-of-court statement was made.[112]

It is always preferable to have the declarant testify before the jury to permit the jury to observe the declarant's demeanor.[113] However, that ideal situation is not always possible.[114] Necessity may require the introduction of out-of-court statements over the alternative loss of relevant and necessary evidence.[115] It has been argued that the inability to observe the declarant's out-of-court demeanor is analogous to the absence of an oath by an out-of court declarant.[116] If the jury can observe the declarant during his in-court testimony, they will be able to determine the declarant's veracity and reliability at the time the out-of-court statement was made.[117] It also has been pointed out that under certain conditions, such as a videotaped statement, the jury is effectively allowed to observe the actual demeanor of the witness at the time the former statement was made.[118]

111. *See* Flewallen v. State, 267 Ind. 90, 93, 368 N.E.2d 239, 243 (1977) (dissent by Justice DeBruler). *See also* Comment, *Evidence—Hearsay and Confrontation*, 27 S.C. L. REV. 257, 271 (1975). The reliability of out-of-court statements cannot be assured if there is no jury present at the time the statement is made and the trial jury is also unable to observe the witness' demeanor during trial because the witness pleads the fifth amendment.

112. *See* Bein, *supra* note 90 at 1023. Bein discusses the pitfall of a witness who fails to remember the act underlying his out-of-court statement. There is a serious question whether that witness can remember his sincerity at the time the out-of-court statement was made.

113. Samuels v. State, 267 Ind. 676, 372 N.E.2d 1186 (1978), in which the court held that the *Patterson* rule cannot allow out-of-court statements to be introduced into evidence as a substitute for available in-court testimony. Note that the opinion was written by Justice Prentice, who also authored the Patterson opinion.

114. *See* California v. Green, 399 U.S. 149 (1969) (witness stated at trial that he could not remember facts of the event in question or the truth of his prior statement).

115. *See Flewallen*, 267 Ind. at 93, 368 N.E.2d at 243 (DeBruler, J., dissenting).

116. *See supra* note 106 and accompanying text.

117. Di Carlo v. United States, 6 F.2d 364 (2nd Cir. 1925) (opinion by Judge Learned Hand). "If from all that the jury sees of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person in court." *Id* at 368. Though this argument was used in the context of a prior inconsistent statement and bases reliability upon the fact there is a contradiction in statements, it has been applied to cases of consistent prior statements also.

118. Cook v. State, 269 Ind. 227, 229, 379 N.E.2d 965, 966 (1978) (Prentice, J.). The court held that the weight and credibility of evidence presented on the issue of voluntariness of the out-of-court statement were matters for the jury to determine. Jurors had heard the witness testify at trial that he was coerced into confessing. The

Therefore, though courts do prefer the declarant's presence at the time the original statement is made,[119] such presence like an oath, is not viewed by liberal hearsay proponents as an indispensible safeguard to ensure the statement's reliability.

If the oath and demeanor of the witness are not necessary to secure the veracity of a statement, it follows that the only remaining acknowledged guarantor of reliability is cross-examination of the declarant. The usual requirements to ensure declarant availability for cross-examination are that: (1) the declarant must be physically present at the trial:[120] (2) the declarant must not invoke his fifth amendment privilege or otherwise be unavailable for questioning,[121] and (3) the declarant must testify on direct examination at the hearing or trial.[122] Normally these criteria allow a cross-examining attorney to question the witness in an adversary context, providing counsel with the opportunity to challenge the witness's story or induce the witness to equivocate the prior statement and thus disclose the truth.[123] Dean Wigmore went so far as to state that cross-examination is "beyond

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jury had also observed a videotape of the defendant's confession, in which he was advised of his rights and in which the defendant stated he was present at the scene and had first hand knowledge. The *Cook* court implied that the witness' demeanor was important and that the videotape was imperative to the admission of the declarant's out-of-court statement.

119. *See Samuels*, 267 Ind. at 671, 679 372 N.E.2d at 1188.

120. Thompson v. Norman, 198 Kan. 436, 424 P.2d 593 (1967) (court held that although third party's deposition was available at trial, where third party was never confronted with the statement in issue during the deposition nor questioned about it, deposition did not satisfy requirement that declarant must be available for cross-examination).

121. Taggert v. State, 269 Ind. 667, 382 N.E.2d 916 (1978). In *Taggert*, a third party confessor asserted his fifth amendment privilege against self-incrimination. The court held that the *Patterson* rule criterion of availability was not met. Consequently the hearsay evidence was not admitted. *See also* Pitts v. State, ____ Fla. App. ____, 307 So. 2d 473, 486 (1975). "If admission of guilt by a party unavailable for cross-examination either as a result of absence or refusal to testify were held admissible in evidence at trial, a veritable 'daisy chain' of extrajudicial confessions would be the inevitable result. An acquitted defendant could submit confessions at a co-defendant's subsequent trial and acquit that party while being protected by double jeopardy." *Id.* at 486.

122. State v. Fisher, 222 Kan. 76, 563 P.2d 1012 (1977). *Fisher* corrects the availability problem by holding that before the opponent can effectively cross-examine a witness, the proponent must call the witness to the stand for direct-examination. If the witness is not called by the opposition, there is a severe limitation on the adversary context of the examination and effective cross-examination is not possible.

123. Ruhala v. Roby, 379 Mich. 102, 150 N.W.2d 146 (1967) (court set forth goals of effective cross-examination and explained why prior out-of-court statements could not be properly cross-examined).

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doubt the greatest legal engine ever invented for the discovery of truth."[124] Every jurisdiction requires that the declarant must be available for cross-examination before testimony may be introduced into evidence.[125] If cross-examination is indeed the most effective safeguard to secure an in-court statement's reliability, it is necessary to ascertain its effectiveness upon prior out-of-court statements.

There exists a minority view which posits that cross-examination of a prior out-of-court statement is as equally compelling to invoke a reliable statement as when the original statement is made in-court.[126] Proponents of this view maintain that when the declarant is on the stand and testifying at trial, he is available for questions upon both in-court and out-of-court statements.[127] The declarant's answers to cross-examination questions are under oath whether the question pertains to an in-court statement or an out-of-court statement. Therefore, a safeguard exists to ensure the reliability of an out-of-court statement.[128] The ability to cross-examine the out-of-court declarant at trial is viewed as providing all the necessary safeguards for obtaining the truth, thus allowing a reasonable departure from the traditional hearsay rule.[129]

However, cross-examination of a prior out-of-court statement creates problems not encountered in the cross-examination of an in-court statement.[130] The declarant may not remember the event that prompted the prior out-of-court statement and may not recall making

124. *See supra* note 50 and accompanying text. The Judicial Conference found that cross-examination was a vital feature of the Anglo-American system of law. *Id.*

125. *See supra* note 43. Traditional hearsay states, liberal hearsay states, and those states and jurisdictions which have adopted the Federal Rules of Evidence all require that the declarant be available for cross-examination.

126. *See* Bein *supra* note 92, at 995 ("Cross-examination can be as thorough as if the prior statement had been made on direct-examination."). *See also* Kirkpatrick, *Reforming Evidence Law in Oregon*, 59 OR. L. REV. 43, 104 (1980) ("[There is] no reason why cross-examination at the time the statement is offered into evidence cannot adequately expose inaccuracies of earlier testimony.").

127. The Senate Evidentiary Committee felt that it was unnecessary to require that a prior out-of-court statement be subject to cross-examination. *See supra* note 53.

128. 3A WIGMORE ON EVIDENCE, *supra* note 28, at 996. ("[T]he witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis of his former statement.").

129. *See* Moten v. State, 269 Ind. 309, 380 N.E.2d 544 (1978), in which the court allowed the prior out-of-court statements of several witnesses, each witness having a consistent statement.

130. *See* McCormick, *supra* note 100, at 576-77.

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the statement at all.[131] These circumstances prevent the opposition from performing an effective cross-examination.[132] It is the adversarial nature of cross-examination that challenges the witness' veracity. Cross-examination enables the jury to evaluate the truthfulness of the witness' prior statement by observing that witness' reaction and response to the cross-examiner's contention that the prior out-of-court statement was false. Effective cross-examination requires an adversary setting. Either a witness who alleges a fact must be examined by a lawyer who wants him to deny that fact, or a witness who denies a fact must be examined by a lawyer who wants him to affirm it.[133] If the witness does not have adequate memory of the prior event, it is impossible for the cross-examiner to compel the witness to adopt a position as to what occurred. It is not possible to effectively challenge the facts of a witness' statement until the witness expresses a firm position on those facts.[134] In the situation where a non-declarant witness of the out-of-court statement is under oath at trial and subject to cross-examination, the in-court statement's reliability is not secured if the underlying event is not clearly remembered by that witness.[135] The extent to which the cross-examiner would be able to challenge the witness or induce him to equivocate concerning the veracity of a prior statement is very limited because that witness does not know if the out-of-court statement was true. The cross-examiner is, therefore, unable to challenge this witness about the truthfulness of the statement and it is introduced into evidence without any safeguard as to its veracity.[136]

Even when the declarant has a clear memory of the prior event and remembers making the prior statement in a specific context, cross-examination is inadequate to ensure veracity.[137] The principle virtue of cross-examination is its immediate application as a testing process. "Its strokes fall while the iron is hot."[138] False testimony will harden

131. Falknor, *The Hearsay Rule and Its Exceptions*, 2 U.C.L.A. L. REV. 43 (1954).

132. *See Ruhala* 379 Mich. at 113, 150 N.W.2d at 156.

133. *Id.*

134. *See* Falknor, *supra* note 131, at 47 ("Suppose [the declarant] purports not to remember the particular matter to which the alleged prior statement relates . . . it is evident that cross-examination does not hold much promise as a satisfactory 'testing' procedure.").

135. *See supra* note 94 and accompanying text.

136. *See Ruhala*, 379 Mich. at 113, 150 N.W.2d at 156.

137. *See* People v. Johnson, 68 Cal. 2d 646, 441 P.2d 111 (1968), in which the court held that belated cross-examination before the jury is not an adequate substitute for the right to cross-examine contemporaneously with the original testimony.

138. State v. Saporen, 205 Minn. 258, 362, 285 N.W.898, 901 (1938). In *Saporen*, the Supreme Court of Minnesota upheld the traditional rules of hearsay by preven-

and become further entrenched in the witness's statements as the witness feels more necessity to maintain a consistent position.[139] A witness may also be influenced between the time his out-of-court statement is made and the time he testifies by others who wish to maintain a falsehood and thus impede disclosure of the truth.[140] Even if the thrust of cross-examination is relatively deadly to the in-court consistent statement, the memory of the prior out-of-court statement may remain unscathed in the back of the juror's mind.[141] The jury may not realize that impeachment of the in-court statement creates an impeachment of the prior out-of-court statement.

In those situations were the trial witness is not the actual declarant of the out-of-court statement, but rather someone who heard the out-of-court statement made by another, the probability of cross-examination ensuring the statement's reliability becomes negligible. In this context, the only effect of cross-examination is to probe the sincerity, perception, memory and narrative capacity of the observer of the declaration, not those qualities of the declarant himself.[142] Thus, the cross-examiner is unable to test the reliability of this witness's factual basis and is only examining the witness's ability to report what he heard. This procedure will not serve to ensure the reliability of the underlying statement.[143]

Even if proper safeguards for the reliability of prior out-of-court statements are created and implemented, the value of such statements nevertheless remains inherently suspect. The situation and context under which the prior statements are offered at trial determines their evidentiary value.[144] The most common uses of prior consistent statements include situations in which they are: (1) offered in the case-in-chief before any impeachment: (2) offered after impeachment by subsequent inconsistent statements, and (3) offered after impeachment consisting of charges of recent fabrication or improper influence.[145] The merit of these uses is controversial.

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ting prior out-of-court statements to be admitted for substantive purposes. It held cross-examination of prior our-of-court statements to be virtually ineffective. *Id.*

139. *Id.* ("False testimony is apt to harden and become unyielding to the blows of truth in proportion as the witness has opportunity for reconsideration and influence by the suggestions of others, whose interest may be, and often is, to maintain falsehood rather than truth.").

140. *Id. But see* C. McCORMICK, *supra* note 1, at 602.

141. *See Ruhala*, 379 Mich. at 115, 150 N.W.2d at 158.

142. *See* Beaver and Biggs, *supra* note 96.

143. *Id.*

144. 4 WIGMORE ON EVIDENCE, *supra* note 28, at 255.

145. *Id.* at 255-60.

The most unnecessary use of prior consistent statements is their introduction during direct examination in the case-in-chief. In this context, the proof that a consistent statement was made is neither essential nor valuable to the determination of the truth.[146] The mere repetition of a story does not increase its truthfulness.[147] Common observation and experience reveal that a falsehood may be repeated as often as the truth.[148] Repetition does not magically enrich the substantive value of such statements,[149] for an inaccurate story is just as incorrect after ten repetitions as it was originally.[150]

Not only does a prior consistent statement have little or no positive value before impeachment, it adversely affects a trial. The prior consistent statement wastes valuable court time by bolstering the declarant's in-court testimony before any contest to the testimony is made by the opponent.[151] It is possible that the opponent will not challenge the in-court statement, thereby making rehabilitation of the declarant's testimony unnecessary. Furthermore, prior statements enable a declarant to repeat his testimony on direct examination over the opponent's objection.[152] The declarant can testify about an event he observed and, during the same direct examination, testify as to what he told others out-of-court about that event. It is prejudicial to an opponent when a court permits the state's witnesses to repeat their testimony over objection on direct examination and just as prejudicial to permit the state to use prior consistent statements for that purpose.[153] If the court prohibits a witness from bolstering his statement by repeating it, that same repetition should not be permitted

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146. *Id.* at 255 ("When the witness has merely testified on direct-examination, without impeachment, proof of consistent statements is unnecessary and valueless."). *See also* Travers, *Prior Consistent Statements*, 57 NEB. L. REV. 974, 981-982 (1978) (if jurors are given no reason to disbelieve the in-court statement, they will have little interest in prior consistent statements regardless of the use to be made of such statements).

147. *See* State v. Parish, 79 N.C. 610, 612 (1878) (out-of-court statement not merely of little value, but also dangerous because it was not made under oath).

148. *Id.*

149. *Id.*

150. *See* 4 WIGMORE ON EVIDENCE, *supra* note 28, at 255.

151. *See Flewallen*, 267 Ind. at 94, 368 N.E.2d at 243. *See also* C. MCCORMICK, *supra* note 1, at 103.

152. Karlson, *Survey of Recent Developments in Indiana Law-Evidence*, 12 IND. L. REV. 192 (1979). Karlson discusses *Flewallen* and the problems involved when the court allows statements to verify the content of an out-of-court declaration. Karlson found that the repetitiveness of the statement in *Flewallen* was designed to bolster the in-court testimony of the declarant and to reemphasize its content.

153. *Id.* at 194.

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through an indirect means, such as the admission of a prior consistent statement.[154]

Just as prior statements allow the witness to improperly repeat testimony, such statements also permit leading questions on direct examination.[155] Leading questions suggest to the witness the answer that is desired and thus remove from the examination the illicitation of a spontaneous answer that is more likely to be truthful.[156] Allowing prior consistent statements to be introduced before the declarant testifies on direct examination permits a leading question in its most objectionable form.[157] The direct examiner is permitted to prompt the witness on all the details of the story before any questions are asked of the declarant.[158] The in-court testimony may become nothing more than an acknowledgment or reiteration of the prior statement read to the witness.

The out-of-court statement may act as a substitution for in-court testimony if the witness simply verifies the accuracy of the prior statement.[159] If the prior statement is used as substantive evidence and there is no other corroborative evidence introduced at trial, a conviction may be based upon ex parte statements.[160] The "best evidence rule"[161] should be applied in this situation when both the prior out-of-court statement and contemporaneous in-court statement are available. Live in-court testimony is preferred to a hearsay statement. The live statement will be admitted to the exclusion of the hearsay statement whenever the live statement is available.[162] Not only will in-court testimony remedy the problem of ex parte convictions

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154. *Id.*

155. Gooderson, *Previous Consistent Statements*, 26 CAMBRIDGE L.J. 64 (1968). Gooderson provides English criticism regarding the introduction of prior statements into evidence. It is important to note that England has abolished the hearsay rule and therefore has had more experience in resolving the difficulties of using hearsay evidence.

156. *See* C. MCCORMICK, *supra* note 1, at 8.

157. *See* Gooderson, *supra* note 155, at 67.

158. *Id.*

159. *See Flewallen*, 267 Ind. at 92, 368 N.E.2d at 241. In *Flewallen*, the court allowed the prior consistent statement to be read in its entirety to the jury even though the declarant was present at trial. The declarant testified briefly only to acknowledge the accuracy of the statement. *Id.*

160. *See* Bein, *supra* note 90.

161. *See* C. MCCORMICK, *supra* note 1, at 559 ("The 'best evidence rule' requires that the best evidence the nature of the case will admit, shall always be required, if possible to be had; but if not possible, then the best evidence that can be had shall be allowed."). *See also* Gard, *Survey of Kansas Law-Evidence*, 12 KAN. L. REV. 239 (1963).

162. *See* C. MCCORMICK, *supra* note 1, at 559.

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but it will also allow the implementation of the traditional safeguards of witness reliability.

In contrast to statements used as substitutes for in-court testimony, out-of-court statements offered after the opposing counsel has impeached the witness with inconsistent statements do not have the same potential for admitting unnecessary hearsay. The admission of unnecessary hearsay is limited because the prior statements are not used in direct examination but are restricted to redirect-examination or rebuttal evidence. However, statements introduced after impeachment do have the possible danger of permitting the declarant to make both consistent and inconsistent statements out-of-court and then selecting the most appropriate statement to support the current in-court testimony.[163] This situation leaves the declarant with a statement to bolster his testimony regardless of which story he eventually choses to give at trial.[164] In order to obtain the improved accuracy inherent in a prior statement made close to an event, the court should only admit those prior consistent statements made close to the event rather than subsequent inconsistent statements.[165] Any prior consistent extra-judicial statement made after the prior inconsistent statement should not be admitted. The later prior consistent statement was made further from circumstances surrounding the event and has less proximity to the event than the inconsistent statement. If either out-of-court statement should be allowed, it should be that statement made nearer to the event when the details were fresher in the declarant's mind. Admitting both statements increases the probability of statement fabrication.[166]

The last kind of prior consistent statements to be discussed are prior statements offered after the in-court testimony is impeached by charges of recent fabrication or improper influence or motive.[167] The admission of prior statements in this context is very limited because the opposing counsel must open the door to the hearsay statement by stating or implying that the in-court statement was fabricated or

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163. *See* Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439 (1936).

164. *Id.*

165. Graham, *Prior Consistent Statements: Rule 801 (d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 HASTINGS L.J. 575 (1979).

166. *Id.* at 601 ("It is possible, if not probable, that the inducement to make . . . [prior consistent statements] is for the very purpose of counteracting those first statements uttered.").

167. These prior consistent statements are allowed into evidence by the *Patterson* rule and are specifically admitted into substantive evidence by FED. R. EVID. 801 (d)(1)(B).

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improperly influenced.[168] The limitation on the situations under which such statements are admitted restricts the opportunity for abusive use of such statements. An opposing party who would be harmed by the statements is, in effect, given control of their introduction.[169] Although these hearsay statements also have a higher risk of unreliability than in-court statements, the fact that the party that can be harmed by the statements has the power to limit their admission tends to justify their introduction into evidence for rebuttal purposes only.

In contrast to the aforementioned negative traits of prior consistent statements, there are acknowledged positive attributes of such statements. The most pervasive and frequently used justification for admitting prior consistent statements is that the prior statement was made more proximate to the event in question and therefore is likely to be more accurate than later testimony.[170] Another view is that the prior statement is superior to in-court testimony simply because it was made nearer the event and is less likely to be the result of a cognitive process.[171] The greater the lapse of time between the event and the trial, the greater the chance the declarant will be exposed to influences and either second guess what was observed, or lose a clear memory of the event altogether.[172] Therefore, based upon the value of its proximity to the event, the prior consistent statement is considered both reliable and valuable.

In response to the alleged benefits of the "nearest in time" argument, virtually every hearsay statement offered in any case will be made nearer in time to the event than the in-court testimony.[173] Unless the hearsay rule is to be abandoned altogether, the argument that nearness in time in and of itself assures accuracy cannot be used to justify the admission of out-of-court statements.[174] The enhanced

168. *See* REPORT OF THE JUDICIAL CONFERENCE, *supra* note 50.

169. *Id.*

170. *See* Bein, *supra* note 90, at 970. Bein sets forth the acknowledged benefits of prior statements, primarily in the context of prior inconsistent statements. She also points out the negative aspects of out-of-court statements that create a need for restraint and safeguards on their admission. *See also* McCormick, *supra* note 87, at 577.

171. *See* McCormick, *supra* note 87, at 577 ("The courts themselves stress the importance of recency of memory . . . The time element plays an important part, always favoring the earlier, in respect of all the hazards [of hearsay].").

172. *Id.* Accord C. MCCORMICK, *supra* note 1, at 602 ("The requirement of the hearsay exception of memoranda of past recollection, that the matter have been recorded while fresh in the memory, is based precisely on this principle.").

173. *See* Bein, *supra* note 90, at 970.

174. *Id.* at 971.

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reliability of a prior statement decreases as the length of time between the event and the making of the statement increases. Therefore, the theory that statements made nearer the event are *per se* more accurate than statements made sometime after the event, for example at trial, is suspect at best. If this "freshness" theory is to be viable, standards should be established concerning the maximum time period which may elapse between the event's occurrence and the making of a statement regarding the event; if the time period is lapsed, the assumed accuracy of the prior statement would be forfeited. A standard of this sort would ensure that prior statements which are admitted were actually made while the declarant possessed a clear memory.

Another proposed benefit from prior consistent statements is that they logically support a witness' credibility.[175] This is an important rebuttal tool when the witness has been impeached by allegations of undue influence or motive.[176] If the prior statement is used only to disprove these charges of influence or motive, and not used as new substantive evidence, their admission will help the jury to better determine a witness' credibility without unduly prejudicing the opposing party.[177]

A balancing test should be used to determine whether prior consistent statements should be admitted into evidence. This test would weigh the difference between the value of the prior statements and the dangers inherent in admitting such statements.[178] Positive attributes of prior statements include greater accuracy due to nearer proximity in time to the event in question and logical support for a witness' credibility.[179] These benefits must be balanced against the dangers of wasting court time, repetition of testimony, allowing leading questions on direct examination and substituting out-of-court statements for available in-court testimony.[180] These factors should be balanced by the court on a case-by-case basis to determine if the admission of the prior out-of-court statements will allow the jury to receive the most necessary and reliable evidence.[181]

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175. *See* Graham, *supra* note 165.

176. *See* FED. R. EVID. 801 (d)(1)(B).

177. Gard, *Survey of Kansas Law—Evidence*, 12 KAN. L. REV. 239 (1963).

178. *See* Graham, *supra* note 165, at 616 ("[The] risk of unfair prejudice, confusion of the issues, and misleading the jury associated with the introduction of consistent statements should not be entertained when the prior consistent statement neither denies, explains, nor rebuts . . .").

179. *See supra* notes 171-74 and accompanying text.

180. *See supra* notes 151, 152, 157 and accompanying text.

181. Baker, *The Right to Confrontation, The Hearsay Rules, and Due Process—a*

The *Patterson* hearsay rule did not provide for any balancing of prior consistent statements' positive and negative attributes. The original *Patterson* rule allowed the introduction of any prior statement, consistent or inconsistent, requiring only that the declarant be available in court for cross-examination. The rule was established without specifying any benefit to be gained from the introduction of prior statements. The *Patterson* court simply ruled that cross-examination would properly safeguard any hearsay defects and failed to explain its analysis for reaching such a conclusion.[182] This simplistic policy has opened the door to unreliable evidence.

IV. THE EVOLUTION OF THE PATTERSON RULE AND ITS NEGATIVE TRAITS

The *Patterson* rule is such a liberal hearsay rule that both the Indiana Court of Appeals and the Supreme Court of Indiana have placed limitations upon its application.[183] Notwithstanding these additional limitations, this rule permits the introduction of unreliable statements into substantive evidence.[184] The *Patterson* rule also creates the potential for allowing unreliable evidence into the courtroom in situations that have not as yet been brought before Indiana's courts.[185] In response to the dangers inherent in the *Patterson* rule, other states that have abandoned the traditional hearsay rule have implemented vital additional restrictions on the admissibility of out-of-court statements. These restrictions can be applied to the *Patterson* rule to increase the reliability of hearsay introduced in Indiana courts without unnecessarily impeaching the introduction of out-of-court statements.

A. The Patterson rule has been limited by subsequent Indiana case law.

Soon after the *Patterson* holding was handed down, Indiana courts began to limit its application in order to increase the reliability of out-of-court statements. This limitation was achieved by narrowing

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Proposal for Determining when Hearsay may be used in Criminal Trials, 6 CONN. L. REV. 529 (1974).

182. *See* Patterson v. State, 263 Ind. 55, 57, 324 N.E.2d 482, 484 (1975).

183. *See infra* notes 188-213 and accompanying text.

184. *See infra* notes 223-49 and accompanying text.

185. *See infra* notes 255-60 and accompanying text.

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the scope of admissible extrajudicial statements. The Indiana Court of Appeals has been very active in restricting the *Patterson* rule. The first restriction on the rule came in *Lloyd v. State*.[186] In *Lloyd*, the trial court admitted the prior statement of a witness who claimed at trial that he had no memory of the portion of the statement in question. The court of appeals reversed the trial court, holding that the *Patterson* rule cannot be used to admit out-of-court statements when the declarant does not remember that part of the statement which is prejudicial to the defendant.[187] Therefore, the *Lloyd* court prohibited the hearsay statement from being considered in determining the sufficiency of the evidence to sustain the defendant's conviction.

The *Lloyd* court's requirement that a witness recall making the prior out-of-court statement before the *Patterson* rule may be used to admit the statement was supported in the Indiana Supreme Court in *Lamar v. State*[188] and the appellate case of *Carter v. State*.[189] Both of these subsequent cases built upon *Lloyd* in establishing prerequisites to the admission of out-of-court statements. In *Lamar*, the supreme court allowed the extrajudicial statements of the defendant's son to be admitted into substantive evidence, requiring that: (1) the witness not deny making the statement; (2) the witness not profess ignorance of the statement, and (3) the witness be available for cross-examination.[190] The *Lamar* court found these prerequisites to be implicit in *Patterson*'s fact situation. Consequently, the court required a showing of such prerequisites before the *Patterson* rule would be applied.[191]

186. 166 Ind. App. 248, 335 N.E.2d 232 (1975). In *Lloyd*, the trial court allowed a witness' prior out-of-court statement to be introduced into evidence via the *Patterson* rule even though the witness claimed he was unable to remember making the portions of the statement describing the defendant's involvement.

187. *Id.* at 256, 335 N.E.2d at 237. The *Lloyd* court would not allow an out-of-court statement into evidence because the declarant had forgotten he made the statement. In order for such a prior statement to be allowed, there must be a written statement of such a declaration introduction into evidence, or other extrinsic evidence that the statement was made. *Id.*

188. 266 Ind. 689, 366 N.E.2d 652 (1977).

189. Carter v. State, ___ Ind. App. ___, 412 N.E.2d 825 (1980). The *Carter* court interpreted a quotation from *Patterson* as establishing foundational requirements for the *Patterson* rule. These requirements include: 1. the physical presence of the declarant in the courtroom; 2. the declarant must be confronted with the prior statement and either acknowledge or disavow making the statement; and 3. the declarant's testimony concerning the statement must be subject to cross-examination. *Id.* at 829.

190. *See Lamar*, 266 Ind. at 694, 366 N.E.2d at 665.

191. *Id.*

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In *Carter*, the court of appeals interpreted the same *Patterson* language which was cited by *Lamar* as a basis for its prerequisite requirements regarding application of the *Patterson* rule. The *Carter* decision confirmed *Lamar's* requirement that the witness be available for cross-examination, but established two additional requirements which are perceived as slightly different from the requirements forth in *Lamar*. *Carter* construed the words "available for cross-examination" in *Patterson* to means that: (1) the witness must be physically present in the courtroom and, (2) the witness must acknowledge or disavow making the prior statement.[192] The *Carter* court went on to hold that if a witness denied or failed to recollect making a prior statement, that witness would not be available for effective cross-examination.[193] Therefore, *Lloyd, Lamar* and *Carter* all hold that memory of the prior statement is a prerequisite to implementing the *Patterson* rule.[194]

The Indiana Supreme Court has recently cast doubt about the validity of the memory requirement established in Indiana's appellate courts. In *Limp v. State*,[195] the supreme court held that a witness' credibility can be attacked by a prior inconsistent statement. The court defined an inconsistent statement to include a statement the witness denied making or a statement that the witness couldn't remember making.[196] The *Limp* court held that prior inconsistent statement can be introduced into evidence to prove the truth-of-the-facts asserted. Given the holding in *Limp*, the prosecutor can ask the witness on direct examination whether he had made a prior statement. If the answer is "no" or "I don't remember," the prosecutor can then claim the in-court statement is inconsistent with the out-of-court statement and introduce the prior out-of-court statement as substantive evidence. Although the Indiana Supreme Court did not directly overrule *Lamar* or address the memory requirements established by the appellate court in *Lloyd* or *Carter*, the *Limp* decision opens the door to the admission of out-of-court statements for substantive purposes even when the declarant does not remember making the statement.

In contrast to the tenuous appellate court restrictions on *Patter-*

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192. *See* Carter, ___ Ind. App. at ___, 412 N.E.2d at 830.

193. *Id.*

194. *But see* Arch v. State, 269 Ind. 450, 381 N.E.2d 465 (1978), in which the Indiana Supreme Court allowed a declarant's out-of-court statement after the declarant failed to recall the events in question. The court deemed it necessary to admit the prior statements as the declarant was considered a hostile witness.

195. ___ Ind. ___, 431 N.E.2d 784 (1982).

196. *Id.* at ___, 431 N.E.2d at 787.

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son that have not yet been incorporated by the Indiana Supreme Court, the latter court has imposed a limitation upon the *Patterson* rule prohibiting a party from proving its case through the use of sworn statements when the witness is available for in-court testimony.[197] In *Samuels v. State*,[198] the supreme court prohibited out-of-court statements from being used as a substitute for in-court testimony. *Samuels* was decided as a response to the case of *Flewallen v. State*.[199] In *Flewallen*, the supreme court allowed the prosecution to read prior statements to the jury in lieu of direct personal testimony from a witness who was sitting in the courtroom.[200] The *Flewallen* court cited the *Patterson* rule as its authority for admitting the prior statements into evidence.[201] *Samuels* overruled *Flewallen* and held that absent the necessity of choosing between permitting prior statements to be used as substantive evidence or the total loss of necessary relevant evidence, the court must attempt to base its case upon live in-court testimony to alleviate the dangers of hearsay.[202]

The Indiana Court of Appeals expanded the *Patterson* limitation established in *Samuels*, holding in *D.H. v. J.H.*[203] that before an out-of-court statement may be introduced into evidence, the declarant must testify in court.[204] Requiring the out-of-court declarant to testify in-

197. Samuels v. State, 267 Ind. 676, 372 N.E.2d 1186 (1978) (opinion by Justice Prentice, author of the *Patterson* rule) (use of out-of-court statements as substitutes for in-court statements created need to re-evaluate the *Patterson* rule).

198. *Id.*

199. 267 Ind. 90, 368 N.E.2d 239 (1977).

200. *Id.* The trial court allowed the State to read to the jury statements prepared by witnesses prior to trial. Each witness simply confirmed that he or she made the prior statement. There was no effective direct-examination of the witness on the stand. The Supreme Court of Indiana upheld the introduction of the prior statements citing the *Patterson* rule. 267 Ind. at 94, 368 N.E.2d at 241. The court held that the *Patterson* rule only required that the declarant be available for cross-examination. Justice DeBruler's dissent, however, was later accepted in the *Samuels* decision. Samuels v. State, 267 Ind. at 679, 372 N.W.2d at 1187.

201. 267 Ind. at 92, 368 N.E.2d at 241.

202. *See Samuels*, 267 Ind. at 678, 372 N.E.2d at 1188. *See also Flewallen*, 267 Ind. at 97, 368 N.E.2d at 243 (DeBruler, J., dissenting). 267 Ind. at 97, 368 N.E.2d at 243. DeBruler contrasted the situation of available witnesses in *Flewallen* with the facts in California v. Green, 399 U.S. 149 (1969). In *Green* the Court faced the alternative of either allowing out-of-court statements into evidence or completely losing necessary relevant evidence. The Court in *Green* held that the danger of losing such statements warranted their admission. California v. Green, 399 U.S. at 158. DeBruler distinguished *Green* from the facts in *Flewallen* by noting the lack of compelling necessity for the statements in the latter case. 267 Ind. at 97, 368 N.E.2d at 243.

203. D.H. v. J.H., ___ Ind. App. ___, 418 N.E.2d 286 (1981) (prohibited the out-of-court statement from being admitted into substantive evidence).

204. The court of appeals did not believe that the *Patterson* rule was as broad

court before any extrajudicial statement may be introduced prevents the substitution problem addressed in *Samuels* and ensures effective cross-examination.[205] The opponent will be able to cross-examine the declarant in close proximity to the declarant's in-court testimony. The examiner will also be able to question the declarant in an adversarial context in order to elicit the truth by pointing out weaknesses and inconsistencies in the witness' testimony.[206]

The court of appeals has gone further than simply requiring the declarant to testify in-court before the out-of-court statement may be admitted into substantive evidence. In *Carter v. State*[207] the appellate court held that the declarant must also have been cross-examined before the prior statement qualifies for admission. This limitation on the *Patterson* rule gives the opposing counsel some control over whether an out-of-court statement will be admissible.[208] The requirement also eliminates the dangers inherent in improperly bolstering the declarant's statement[209] and prohibits repetitive testimony.[210] The Supreme Court of Indiana has not yet ruled on these current *Patterson* rule prerequisites established by the appellate court.

Another important *Patterson* limitation introduced by the Indiana Court of Appeals is that a declarant must be confronted with his out-of-court statement and either affirm or deny that he made the statement before it can be admitted into evidence.[211] The confrontation requirement ensures that the declarant made the statement before it is subsequently admitted. Without the confrontation requirement, a declarant could testify on both direct and cross-examination and an out-of-court statement could subsequently be introduced that contained more details or was more prejudicial to the defendant than the in-

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as indicated from its initial definition. Not only must the declarant be in court, he must also testify and then be subject to cross-examination. *Id.* at ___, 418 N.E.2d at 295.

205. *See supra* notes 197-202 and accompanying text.

206. *See also* Carter v. State, ___ Ind. App. ___, 412 N.E.2d 825 (1980).

207. *Id.*

208. *See infra* notes 266-69 and accompanying text.

209. *See infra* notes 256-60 and accompanying text.

210. *See supra* note 152 and accompanying text.

211. *See* Smith v. State, ___ Ind. App. ___, 400 N.E.2d 1137 (1980), in which the court of appeals held that it is important that the declarant does not deny making the out-of-court statement. That court never required that the witness verify the statement, only that he must not deny making it. *Id. Carter* and *D.H.* have interpreted *Smith* as establishing a confrontation requirement whereby the out-of-court declarant must specifically acknowledge or disavow making the prior statement. *Carter* at ___, 412 N.E.2d at 829; *D.H.* at ___, 418 N.E.2d at 295.

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court statement. If the declarant subsequently denied making the prior statement or claimed a lack of memory about the details of the statement, the opponent would be unduly prejudiced without an opportunity for effective cross-examination.[212] Requiring the declarant to verify or deny the statement prior to introducing the statement into evidence eliminates unnecessary prejudice to the opposing party.[213]

An additional limitation placed upon the *Patterson* rule restricts the admissible portion of the out-of-court statement to that part of the statement available for effective cross-examination.[214] *Smith v. State* involved a witness whose in-court testimony was consistent with only a portion of her out-of-court statement. The out-of-court statement consisted of the witness' statement and the statement of two others. The Indiana Court of Appeals held that those portions of the out-of-court statement made by persons who were not at the trial and not available for cross-examination could not be admitted into evidence via the *Patterson* rule.[215] The cross-examination of the in-court witness could not ensure the reliability of those portions of the statement not made by the in-court witness. Therefore, the appellate court set forth a requirement that a prior recorded statement is not admissible in its entirety if only a portion of the statement can be effectively cross-examined.[216]

The Supreme Court of Indiana has placed only one limitation upon the *Patterson* rule since that rule was adopted. This limitation prevents the substitution of out-of-court testimony for in-court testimony.[217] In contrast, the Indiana Court of Appeals has placed several additional limitations upon *Patterson*. The appellate courts require that the out-of-court declarant testify in court,[218] that a declarant

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212. *See supra* notes 130-42 and accompanying text.

213. *See* Williams v. State, 269 Ind. 193, 379 N.E.2d 449 (1978) (Indiana Supreme Court allowed the prosecution to admit prior statement and plea bargain even though declarant did not verify that such statements were made). *Williams* conflicts with the appellate court heldings in *Carter* and *D.H.*. Therefore, the confrontation requirement is tenuous until the Indiana Supreme Court upholds its validity.

214. *See Smith*, ___ Ind. App. at ___, 400 N.E.2d at 1141 ("It does not necessarily follow, however, that because [the witness] was present for cross-examination, the whole of her prior statement was admissible as substantive evidence under *Patterson*. This is because the statement contained statements by two other persons . . ."). The court found the statements of the other persons to be outside of the *Patterson* rule because the declarants were not available for cross-examination. *Id.*

215. *Id.*

216. *Id.*

217. *See Samuels*, 267 Ind. at 678, 372 N.E.2d at 1188.

218. *See supra* notes 189 and 204 and accompanying text.

be confronted with his prior statement,[219] and that a declarant remember making his out-of-court statement.[220] The appellate court also requires court also requires that the declarant be cross-examined before the out-of-court statement is introduced into evidence[221] and that only that portion of the statement that is subject to effective cross-examination may be admitted into evidence.[222] Notwithstanding the limitations placed upon the *Patterson* rule by Indiana's Supreme Court and Appellate Courts, the rule continues to fail to ensure the reliability of hearsay evidence.

B. The Patterson rule is not effective in preventing unreliable hearsay statements from being used as substantive evidence.

The dangers of a liberal hearsay rule are evident from the applications of the *Patterson* rule. It is important to remember that the acknowledged danger of hearsay is that the credibility of the declarant, and therefore the reliability of the statement, are not adequately safeguarded when the statement is made out-of-court.[223] Therefore, anytime the *Patterson* rule allows patently unreliable or traditionally inadmissible statements into substantive evidence, it violates the hearsay rule's purpose.

The *Patterson* rule has been used to admit prior statements into substantive evidence even though the declarant denied the truth of the statement. In *Moten v. State*,[224] several witnesses gave statements to the police after the event in question. Each witness admitted at trial that he had made a prior statement but that the prior statement was false. The witnesses did not testify about the content of their out-of-court statements except to state that it was false "street talk." They did not make in-court statements inconsistent with the out-of-court statement but simply denied the truth of the prior statements. The Supreme Court of Indiana allowed the refuted statements in *Moten* to be introduced into substantive evidence.[225]

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219. *Smith*, ____ Ind. App. at ____, 400 N.E.2d at 1141.

220. *Lloyd*, 166 Ind. App. at 253, 335 N.E.2d at 237.

221. *D.H.*, ____ Ind. App. at ____, 418 N.E.2d at 290.

222. *Smith*, ____ Ind. App. at ____, 400 N.E.2d at 1141.

223. *See* C. McCormick, *supra* note 1, at 281. *See also* Comment, *supra* note 94 and accompanying text.

224. 269 Ind. 309, 380 N.E.2d 544 (1978) (two witnesses who denied truth of their earlier statements claimed they were threatened by police to make the statements).

225. *See also* Arch v. State, 269 Ind. 450, 381 N.E.2d 465 (1978). In *Arch*, the declarant was a confederate of the defendant and had earlier plead guilty to a lesser

The danger in admitting prior statements that have been repudiated by the declarant is that there is not effective means of cross-examining such a statement. A prior inconsistent statement can be cross-examined in court at the same time the current in-court testimony is given. The declarant is under oath when answering questions about both statements and the jury is able to view the declarant's demeanor while qualifying or denying the prior inconsistent statement.[226] In contrast, a refuted prior statement that is not accompanied by additional in-court testimony simply brings to the court extrajudicial evidence that does not lend itself to any of the conventional safeguards of reliability.[227] The result is that unrestricted hearsay is introduced into substantive evidence.

The Indiana Supreme Court cases of *Moten v. State* and *Arch v. State*[228] also present the problem of admitting prior out-of-court statements made under influence or duress. In *Moten*, the witnesses claimed they were threatened by police and gave the out-of-court statements to avoid arrest. In *Arch*, the defendant argued that the witness gave the prior statement in return for lenient treatment by the prosecutor. The supreme court held in both cases that the *Patterson* rule allows such prior statements to be introduced into evidence to prove the truth-of-the-facts asserted. The court held that the possible influence and duress involved with the statement will simply be one factor among many that the jury will consider in determining credibility.[229] It is not certain the jury will possess sufficient information to determine whether a statement was made voluntarily or involuntarily unless that statement is made in the jury's presence.[230]

offense. At the defendant's trial the declarant failed to recall the events in question. The witness did not make a statement inconsistent with the prior statement but simply disavowed the prior statement. The Indiana Supreme Court admitted the prior statement, holding that the jury could evaluate both the prior statement and its repudiation at the same time. *Id.*

226. *See supra* notes 115-17 and accompanying text.

227. If the prior statement was not made under oath, the demeanor of the declarant when the prior statement was made cannot be observed by the jury and the declarant's demeanor during repudiation is of little value. The opponent cannot effectively cross-examine the witness because the witness has already repudiated the statement that was harmful to the opponent. Therefore, the prior statement is admitted without any safeguard for reliability.

228. *See Arch*, 269 Ind. at 454, 381 N.E.2d at 468. The Indiana Supreme Court held that the fact the declarant was offered leniency in exchange for the statement did not reflect upon the statement's reliability. The jury could still observe the witness' demeanor and, therefore, was capable of weighing the truth of the statement. *Id.*

229. *Id. See also Moten*, 269 Ind. at 311, 380 N.E.2d at 546. *Compare* Stone v. State, 268 Ind. 672, 377 N.E.2d 1372 (1978).

230. *See* Cook v. State, 269 Ind. 227, 379 N.E.2d 965 (1978). The declarant in *Cook* was videotaped when the out-of-court statement was made. The court held that

Observation of the witness' demeanor while testifying will greatly aid the jury in determining whether duress or undue influence motivated the witness' statement or if the witness made the statement of his own accord. Therefore, the supreme court in *Moten* and *Arch* has deprived the jury of an important opportunity to evaluate the reliability of out-of-court statements.

Another serious *Patterson* rule problem demonstrated in *Moten* involves the admission of prior out-of-court statements from a declarant who did not have first hand knowledge of the event which he is describing. If a witness did not observe the occurrence himself he cannot have first hand knowledge. First hand knowledge of the event is essential to ensure the receipt of even minimally reliable information.[231] The requirement of first hand knowledge as a prerequisite for a witness' testimony on relevant material facts has been established in various evidentiary rules.[232] The first hand knowledge requirement demonstrates a preference for at least minimally reliable sources of evidence.[233] Nonetheless, Indiana has used the *Patterson* rule to permit prior out-of-court statements into substantive evidence notwithstanding that the statements were not based upon first hand knowledge.[234]

The supreme court circumvented the established first hand

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the introduction of the videotape together with the testimony of the interrogating detective gave the jury sufficient information upon which to determine the credibility of the declarant and the reliability of the statement. *Id.*

231. *See* C. McCORMICK, *supra* note 1, at 20 ("One of the earliest and most pervasive manifestations of [the insistence upon the most reliable sources of information] is the rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact.").

232. *See, e.g.*, UNIF. R. EVID. 19. The rule requires that the witness have first hand knowledge of the event before the testimony of the witness may be introduced. The judge may reject the testimony of the witness if he finds that a trier-of-fact would not reasonably believe the witness perceived the event. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." FED. R. EVID. 602.

233. *See* C. McCORMICK, *supra* note 1, at 20.

234. *See Moten*, 269 Ind. at 311, 380 N.E.2d at 546 (two witnesses claimed that their statements were based upon 'street talk' and not first hand knowledge). *See also* Jordan v. State, ____ Ind. ____, 432 N.E.2d 9 (1982). Justice Prentice, author of the *Patterson* rule, wrote a dissent to the *Jordan* court's admission of a conclusory out-of-court statement. *Id.* at ____, 432 N.E.2d at 14. The witness had no knowledge about the robbery until she read about it in the newspaper. She then drew the conclusion that the robbery described in the paper and the robbery mentioned by the defendant were one in the same. *Id.* If the same witness had testified as to this conclusion in-court, an objection relating to this testimony would have been sustained as the conclusion was a fact she surmised rather than one she witnessed.

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knowledge requirement when it allowed a witness to testify about conjectured facts. In *Jordan v. State*,[235] a witness had neither first hand knowledge that the defendant had robbed the gasoline station in question, nor knowledge as to whether the defendant had ever been to that particular gasoline station.[236] However, based upon a newspaper account of the robbery and the fact that the defendant told her that he had been involved in a robbery, the witness concluded that the defendant had robbed the particular gasoline station in question.[237] The state introduced the witness' conjecture into evidence in the form of a prior out-of-court statement by utilizing the *Patterson* rule.

The dissent in *Jordan* was written by Justice Prentice, the author of the original *Patterson* opinion. Justice Prentice stated that the *Patterson* rule, as applied in *Jordan*, allows an out-of-court statement into evidence that would be an inadmissible conclusion of the witness if made in-court.[238] Justice Prentice suggested limiting *Patterson* to prevent this type of abuse.[239] Furthermore, there are no adequate means of effectively examining the reliability of testimony elicited from a declarant who does not have first hand knowledge of the event in question. The declarant can only be examined on his receipt of information from another and his narrative ability.[240] Consequently, the jury receives substantive testimony from the out-of-court declarant which is not checked for even minimal reliability.[241]

The most recent abuse of the *Patterson* rule is found in cases in which the declarant pleads the fifth amendment. In *Rapier v. State*,[242] the declarant repudiated the validity of the out-of-court statement,

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235. *Jordan*, ___ Ind. at ___, 432 N.E.2d at 9.

236. *Id.* at ___, 432 N.E.2d at 14.

237. *Id.*

238. *Id.*

239. *Id.*

240. *See* Beaver and Biggs, *supra* note 96.

241. *See* Bein, *supra* note 90 (when witness claims that he never had perceptual basis for statement, meaningful cross-examination is limited at best).

242. Rapier v. State, ___ Ind. ___, 435 N.E.2d 31 (1982). The witness in *Rapier* admitted making the prior statement but refuted the statement while testifying in court. When questioned further about the statement the witness relied upon his fifth amendment right against self-incrimination and refused to testify any further. The trial court allowed the witness' prior statement to be introduced into substantive evidence using the *Patterson* rule to support its position. The Indiana Supreme Court rejected the argument that the *Patterson* requirement of cross-examination was not met. That court stated that the opponent never attempted to cross-examine the witness after he claimed his fifth amendment rights. The court held that it was possible that the witness may have changed his mind and testified on cross-examination about something he would not testify about on direct-examination. *Id.* at ___, 435 N.E.2d at 34.

invoked his fifth amendment rights against self-incrimination, and refused to testify any further. The supreme court admitted the refuted prior statement into substantive evidence and cited the *Patterson* rule as its authority.[243] It is logical that if a declarant pleads the fifth amendment on direct examination, he will not want to subject himself to potentially incriminating cross-examination which by its very nature often seeks to discredit an opposing party's witness. In *Rapier*, the Indiana Supreme Court required the opponent of an out-of-court statement to demonstrate that effective cross-examination of the out-of-court declarant was not possible.[244] Therefore, the supreme court imposed upon the cross-examiner the duty to call a declarant to the witness stand even if the declarant has previously stated that he would not testify.[245]

The *Rapier* case raises the question of whether other futile acts must be performed by the cross-examiner before the court finds a witness to be unavailable for cross-examination. If the witness professes ignorance of the statement, as in *Lamar*[246] the issue becomes whether the cross-examiner must question the witness nonetheless to demonstrate the witness has no memory. Similarly, must the cross-examiner prove that the witness will not sufficiently answer the cross-examination question before *Carter*[247] will bar the *Patterson* rule from admitting the prior statement? *Rapier* creates an assumption that there will be an opportunity for effective cross-examination if the declarant is physically present in the courtroom. *Rapier* places the burden upon the cross-examiner to prove effective cross-examination is not possible. *Rapier* is an inconsistent prodigy of *Patterson*, in which the court held that out-of-court statements were admissible into evidence only after effective cross-examination of the witnesses.[248] *Rapier* changes this *Patterson* rule requirement. *Rapier* allows extrajudicial statements into substantive evidence *unless* the cross-examiner can prove effective cross-examination is not possible. It is impractical to place the burden upon the opponent to prove effective cross-examination is impossible. This encumbrance allows unreliable hearsay statements into substantive evidence before the opponent can meet

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243. *Id.*

244. *Id.* In *Rapier*, the Supreme Court of Indiana stated that the declarant may have changed his mind about not testifying. The court based its decision upon the fact that opposing counsel did not attempt to cross-examine the defendant after the fifth amendment privilege was invoked.

245. *Id.*

246. *See* Lamar, 266 Ind. at 702, 366 N.E.2d at 665.

247. *Carter*, ___ Ind. App. at ___, 412 N.E.2d at 829.

248. *Patterson*, 263 Ind. at 57, 324 N.E.2d at 484.

that burden. Therefore, the effect of *Rapier* is to permit more unreliable statements into evidence than the hearsay rule was meant to allow.[249]

The premise that effective cross-examination will ensure the reliability of out-of-court statements, as stated in *Patterson*, has been eroded in subsequent Indiana hearsay cases. The *Patterson* rule has been used to allow out-of-court statements into substantive evidence when the declarant repudiated the statement,[250] lacked first hand knowledge[251] and invoked the fifth amendment right against self-incrimination.[252] In these situations, effective cross-examination was not available, yet the *Patterson* rule was used to allow the statements into substantive evidence. The *Patterson* rule has also been applied in spite of charges that the declarant was under undue influence and duress to make the out-of-court statement.[253] The *Patterson* rule has been so liberally applied that it now allows unreliable statements into evidence because there are situations, like those demonstrated above, where there are no safeguards to ensure reliability. Not all of the potential misapplications of the liberal *Patterson* rule have come before the courts. The opportunity for new abuses of the rule will probably be capitalized upon in future cases.

C. Potential dangers of the Patterson rule.

The problems created by the current *Patterson* rule are not limited to the admission of unreliable extrajudicial statements into substantive evidence.[254] The rule also opens the door to future improper admissions of hearsay evidence. The *Patterson* rule does not have any safeguards to prevent manufactured statements, irrelevant statements, confused statements and numerous bolstering statements from being introduced into substantive evidence. The rule allows the proponent of a statement a great amount of discretion to use hearsay statements without corresponding adequate safeguards to ensure statement reliability.

The *Patterson* rule does not prevent self-serving manufactured statements from being introduced as substantive evidence.[255] The

249. *See supra* notes 92-93 and accompanying text.
250. *See supra* notes 224-25 and accompanying text.
251. *See supra* notes 234-35 and accompanying text.
252. *See supra* notes 242-44 and accompanying text.
253. *See supra* notes 228-30 and accompanying text.
254. *See supra* notes 224-45 and accompanying text.
255. *See* Gooderson supra note 155. Gooderson contends that one of the major

declarant who perceives that his in-court testimony may be weak or ineffective is given an opportunity to bolster his own testimony through the *Patterson* rule. The *Patterson* rule does not prevent a declarant from making out-of-court statements prior to trial to people who would make good witnesses in-court.[256] The chosen listener may be a policeman, a doctor, or any other reliable witness who would create an aura of credibility when testifying about the prior statement at trial. The declarant is therefore, able to create credible witnesses who will support his in-court testimony. The *Patterson* rule places no limitation on the number of new witnesses that can be created. Therefore, the declarant is able to underscore his in-court testimony without adding any evidence that materially increases his reliability.

The consequence arising from a witness bolstering his own testimony with numerous hearsay witnesses is that the jury may over-value that evidence simply because it has been repeated many times.[257] The *Patterson* rule permits essentially all prior out-of-court statements to be used as substantive evidence as long as the declarant is available for cross-examination.[258] The jury is instructed to consider the out-of-court statement as additional substantive evidence of the fact asserted. This evidence is added to the declarant's in-court testimony and other evidence introduced in the case to create the totality of evidence from which the jury is to render its decision.[259] The *Patterson* rule permits the same statement to be introduced into evidence a number of times, skewing the evidentiary weight of the statement. There have been no safeguards placed on the *Patterson* rule to prevent this overvaluation of one declarant's statement.[260]

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purposes behind keeping prior statements out of substantive evidence is that such statements may be specifically manufactured for evidentiary purposes.

256. *See* State v. Saporen, 205 Minn. at 362, 285 N.W. at 901. The Minnesota Supreme Court held that unrestricted use of extrajudicial assertions would increase temptation and opportunity for the manufacture of evidence.

257. *See* Travers, *supra* note 146, at 983. Travers discusses the problem of juries that do not appreciate the fact that the prior consistent statement introduced into evidence was made by the witness also testifying in court. He contends that there is a strong possibility that the jury will over-value the out-of-court statement by considering it as additional new evidence.

258. *See supra* notes 224-45 and accompanying text.

259. *See* Travers, *supra* note 146, at 983.

260. *See, e.g.*, Rapier v. State, ___ Ind. ___, 435 N.E.2d 31 (1982); Jordan v. State ___ Ind. ___, 432 N.E.2d 9 (1982); *D.H. v. J.H* ___ Ind. App. ___, 418 N.E.2d 286 (1981); Carter v. State, ___ Ind. App. ___, 412 N.E.2d 825 (1980); Smith v. State, ___ Ind. App. ___, 400 N.E.2d 1137 (1980).

Furthermore, the *Patterson* rule does not require that the out-of-court statement be relevant to the case.[261] If the declarant has been impeached on cross-examination as having a reputation for lying, evidence that the declarant made the same statement numerous times out-of-court is irrelevant to the declarant's reputation. The prior statements only evade the impeachment issue. A statements accuracy does not change because a declarant with a propensity to lie tells the same story several times. Admitting into evidence an unreliable declarant's out-of-court statements tends only to obscure the declarant's bad reputation rather than rebut that reputation. Therefore, the *Patterson* rule permits irrelevant out-of-court assertions to be introduced in court with the result of confusing the jury about the declarant's veracity.

The potential abuses of the *Patterson* rule are not limited to the examples mentioned above. The situations described are only indicative of how the *Patterson* rule can be utilized in the future. Manufactured self-serving statements, repetitious and thus possibly over-valued statements and irrelevant statements are permitted to be introduced into substantive evidence due to the lack of sufficient limitations upon the *Patterson* rule. These out-of-court statements do not assist the jury in determining the truth and are highly prejudicial to the opponent. Nonetheless, the *Patterson* rule, as interpreted by the Indiana Supreme Court, permits these out-of-court statements to be admitted into substantive evidence notwithstanding their unreliability.

D. Other jurisdictions offer examples of new safeguards that would ensure the reliability of out-of-court statements.

The problem of assuring prior consistent statements reliability has been confronted by virtually every state that has abandoned the traditional hearsay rule.[262] Most of these jurisdictions prohibit the introduction of prior consistent statements into substantive evidence until after the declarant has been cross-examined and only if the cross-examiner attempts to impeach the witness-declarant.[263] This limitation on the admission of prior statements prevents the declarant from

261. *Id.* Beginning with *Patterson* and continuing through all the subsequent Indiana cases implementing the *Patterson* rule, relevancy has never been viewed as a prerequisite to the admissibility of out-of-court statements. *Patterson*, 263 Ind. 55, 224 N.E.2d 482.

262. *See supra* note 43.

263. *See* FED. R. EVID. 801 (d)(1)(B). States which have provided such a restriction on the admission of out-of-court assertions include California, Kansas, New Jersey, New Mexico and Oregon. *See supra* note 5.

bolstering his own testimony on direct examination.[264] The restriction also prevents the out-of-court statement from being admitted when the declarant invokes his fifth amendment rights and refuses to testify at all.[265] Finally, the limitation gives the cross-examiner control over the admission of extrajudicial statements introduced by the opposition because the cross-examiner must first impeach the declarant before prior statements are admissible.[266] Therefore, the cross-examiner can prevent the opposition from introducing manufactured,[267] repetitious[268] and irrelevant[269] prior statements by simply electing not to impeach the witness. A safeguard to prevent the admission of these unreliable and unnecessary statements is thereby established.

States which have not adopted the Federal Rules of Evidence but which allow prior consistent statements to be introduced into substantive evidence have also created a number of restrictions upon the admissibility of extrajudicial statements. Kansas has developed a requirement that the out-of-court statement not be admissible as substantive evidence unless the same statement would be admissible if made by the declarant in court under direct examination.[270] This limitation prevents the out-of-court statement of a declarant without first hand knowledge from being admitted into substantive evidence.[271] It also ensures that only relevant prior statements will be introduced into evidence.[272]

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264. The declarant cannot introduce the prior statement until after the cross-examiner has met the FED. R. EVID. 801 (d)(1)(B) requirement of impeaching the witness by charging the declarant with improper motive or influence during the cross-examination.

265. *See supra* note 242 and accompanying text.

266. The cross-examiner may strategically choose not to impeach the opposing witness in an effort to keep any prior out-of-court statements of that witness out of substantive evidence.

267. *See supra* notes 255-56 and accompanying text.

268. *See supra* note 257 and accompanying text.

269. *See supra* note 60 and accompanying text.

270. *See* KAN. STAT. ANN. § 60-460 (1976) ("[A] statement which is made . . . to prove the truth of the matter stated is hearsay evidence and inadmissible except: a) Previous statements of persons present . . . provided the statement would be admissible if made by declarant while testifying as a witness.").

271. First hand knowledge is required in Kansas for all in-court testimony. KAN. STAT. ANN. § 60-419 (1976). Therefore, § 60-460 places the requirement of first hand knowledge upon out-of-court statements also. KAN. STAT. ANN. § 60-460 (1976). *See also supra* notes 231-32.

272. Kansas also requires that only relevant in-court evidence may be admitted into evidence. KAN. STAT. ANN. § 60-401 (1976); Williams v. Union Pac. R.R., 204 Kan. 772, 780, 465 P.2d 975. Therefore, § 60-460 requires that out-of-court statements must be relevant before they will be admitted into substantive evidence.

Another hearsay limitation initiated in Kansas is that the declarant must testify on direct examination in court before the prior out-of-court statement will be admitted to prove the truth-of-the-facts asserted.[273] This requirement ensures that the witness can be cross-examined with leading questions and impeached, in addition to other effective cross-examination techniques which would not be available if the opponent initially had to call the witness to the stand.[274] This Kansas requirement has the same effect as the *Samuels*[275] decision which prohibited out-of-court statements from being used as substitutes for available in-court testimony.

In addition, Kansas precludes the admission of a statement made in a deposition concerning a prior out-of-court statement unless the declarant in the deposition was confronted with the out-of-court statement during the deposition.[276] A deposition is sometimes used as a substitute for in-court testimony if the declarant is not available to testify.[277] The safeguard of cross-examination is available during the taking of a deposition, and therefore, a deposition is admissible in almost all non-traditional hearsay jurisdictions.[278] The declarant's prior out-of-court statement, however, is not subject to cross-examination if the declarant is not available at trial and the declarant was never confronted with the prior statement during the deposition. Therefore, Kansas prohibits an untested prior deposition statement from being admitted into substantive evidence.

Kentucky and Wisconsin have also abandoned the traditional hearsay rule and consequently have created limitations on the admissibility of out-of-court statements in order to ensure reliability. Kentucky prevents prior statements from being introduced into

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273. *See* State v. Fisher, 222 Kan. 76, 82, 563 P.2d 1012, 1017 (1977), in which the state tendered proof that in-court statements of the witness would be contradictory to prior out-of-court statements. The Supreme Court of Kansas held that the out-of-court statements should not have been admitted through the sheriff's deputies because the witness was never actually called to the stand to testify. *Id.*

274. *Id.* The Supreme Court of Kansas required that the declarant testify prior to the introduction of the prior statement, allowing the opponent to later effectively cross-examine the witness with leading questions. *See also supra* notes 207-09 and accompanying text.

275. *See Samuels*, 267 Ind. at 678, 372 N.E.2d at 1188.

276. *See* Thompson v. Norman, 198 Kan. 436, 441, 424 P.2d 593, 599 (1967). The Supreme Court of Kansas interpreted § 60-460 (a) to prohibit a deposition from being admitted into substantive evidence when the deponent was never confronted with the out-of-court statement at the deposition. *Id.*

277. *See* C. McCormick, *supra* note 1, at 3-5.

278. *See supra* note 43.

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substantive evidence when the declarant refuses to answer only questions other than his name and address on direct examination.[279] This limitation prevents decisions similar to *Rapier*, in which the out-of-court statement was admitted into substantive evidence after the declarant pleaded the fifth amendment.

Wisconsin has specifically restricted the use of an out-of-court statement if the declarant does not have first hand knowledge of the event.[280] This requirement seems necessary to ensure the reliability of in-court and out-of-court statements alike. However, Wisconsin is the only non-traditional hearsay jurisdiction that has specifically established the requirement of first hand knowledge for out-of-court statements.

There appears to be a positive correlation between the length of time a jurisdiction has gone without the traditional hearsay rule and the number of specific limitations it places upon the admission of out-of-court statements.[281] A logical reason for the correlation would seem to be that experience elucidates additional dangers of liberal hearsay rules. Therefore, those jurisdictions that have been liberal in their admission of out-of-court statements for a considerable length of time will have experienced a greater variety of situations in which unreliable hearsay was allowed into evidence. Not suprisingly, those liberal jurisdictions have instituted more limitations on hearsay evidence in an attempt to remedy this problem.

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279. *See* Phillips v. Commonwealth, ___ Ky. ___, 600 S.W.2d 485 (1980). The witness in *Phillips* gave only his name and address upon direct-examination and then refused to answer any further questions. The trial court held that this testimony was sufficient to allow the defendant the availability of cross-examination; consequently, the court admitted this witness' prior out-of-court statements into evidence. The Kentucky Court of Appeals held that the out-of-court statements were inadmissible and reversed the conviction. The appellate court held that a witness that refuses to answer questions on direct examination is not available for cross-examination. *Id.* at ___, 600 S.W.2d at 486.

280. *See* Gelhaar v. State, 41 Wis. 2d 230, 163 N.W.2d 609 (1969). When the Supreme Court of Wisconsin discarded the traditional hearsay rule it established a number of safeguards for the reliability of out-of-court statements. These safeguards include: 1. first hand knowledge; 2. a requirement that the declarant acknowledge making the prior statement, and 3. a requirement that the opponent be given an opportunity to cross-examine the declarant. *Id.* at 614.

281. Kansas has followed non-traditional hearsay rules for over fifteen years and has imposed a number of restrictions on out-of-court statements by statute and case law. *See supra* note 276. Wisconsin abandoned the traditional hearsay rule fourteen years ago and has implemented three primary prerequisites to the admission of out-of-court hearsay. *See supra* note 280. Indiana parted with the traditional rule eight years ago and its Supreme Court has created two safeguards to ensure the reliability of out-of-court statement. *See supra* notes 16 and 113.

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The original *Patterson* rule has been restricted to some degree by the Supreme Court of Indiana[282] and more stringently limited by the Indiana Court of Appeals.[283] In spite of these limitations, the *Patterson* rule has still been manipulated to permit the admission of unreliable out-of-court statements into evidence to prove the truth-of-the-facts asserted.[284] Potential misapplications of the rule that have not yet found their way into the courts create additional dangers of unreliable substantive evidence.[285] Other jurisdictions which have abandoned the traditional hearsay rule have combatted unreliable hearsay evidence by placing numerous restrictions upon the admissibility of out-of-court assertions.[286] The problem faced by the non-traditional hearsay jurisdictions is how to allow necessary, reliable hearsay statements into substantive evidence while preventing the admission of valueless and unreliable statements into evidence. One answer is that these courts should balance the dangers and benefits of the hearsay statement in each individual situation before deciding upon its admission.

V. THE PATTERSON RULE CAN BE TRANSFORMED INTO AN EFFECTIVE HEARSAY RULE

The *Patterson* rule can be made an effective instrument in preventing unreliable extrajudicial statements from being admitted into evidence while simultaneously permitting reliable, necessary hearsay to be admitted as substantive evidence. The first new limitation that should be placed upon the *Patterson* rule is that the out-of-court statement sought to be admitted must be one that would be admissible if given in court[287] and also admissible for a purpose other than bolstering the declarant's testimony.[288] This prerequisite will prevent

282. *See Samuels*, 267 Ind. at 678, 372 N.E.2d at 1188.

283. *See supra* notes 186-93 and accompanying text. *See also supra* notes 203-12 and accompanying text.

284. *See supra* notes 224-54 and accompanying text.

285. *See supra* notes 255-60 and accompanying text.

286. *See supra* notes 262-80 and accompanying text.

287. *See* Karlson, *Survey of Recent Developments in Indiana Law—Evidence*, 12 IND. L. REV. 192, 194 (1979) ("Limiting the *Patterson* rule to those situations in which the statement is already admissible for some other purpose will lend support for eliminating a party's use of carefully prepared extrajudicial statements."). *See also* State v. Saporen, 205 Minn. at 362, 285 N.W. at 901.

288. Without requiring prior statements to be admissible for purposes other than corroborating in-court testimony, there is an incentive for the declarant to make a consistent statement out-of-court that will later be used to bolster his in-court testimony.

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irrelevant and immaterial statements that are not admissible in the form of direct in-court testimony from being received as substantive evidence through the *Patterson* rule.[289] It will also restrict out-of-court statements made by a declarant without firsthand knowledge.[290] Firsthand knowledge is more reliable than second- or thirdhand information because the observer/declarant will have more information about the circumstance and setting of the event than a non-observer.[291] The opponent also has a better opportunity to effectively cross-examine a witness with firsthand knowledge because he can probe the declarant's perception, memory and narrative abilities as they relate to the event in question.[292]

The admissibility limitation will also restrict the introduction of manufactured extrajudicial statements by requiring that out-of-court statements be admissible for a purpose other that to strengthen the declarant's in-court statement. It will be much more difficult for a declarant to manufacture out-of-court statements with probative value in regards to an issue at trial, as opposed to using such statements to merely bolster his in-court statements. This should curtail the incentive for the declarant to create witnesses because their testimony will be merely cumulative and inadmissible.[293] This requirement will also screen out irrelevant hearsay that adds nothing of substantive value to the case.

Another amendment to the *Patterson* rule should be that the declarant must testify in court about the information included in the out-of-court statement,[294] and acknowledge that the prior statement was made before any out-of-court statements may be admitted.[295] This requirement will enable the cross-examiner to question the declarant in an adversarial manner in order to challenge inconsistancies and weaknesses in both the in-court and out-of-court statements.[296] If the declarant does not testify in court prior to the admission of the out-

289. *See supra* notes 255-60 and accompanying text.
290. *See Jordan*, ____ Ind. at ____, 432 N.E.2d at 14.
291. *See* State v. Fisher, 222 Kan. at 82, 563 P.2d at 1017.
292. *See* c. McCormick, *supra* note 1, at 585.
293. *See supra* notes 255-56 and accompanying text.
294. *See supra* notes 273-74 and accompanying text.
295. *See* Falknor, *supra* note 131, at 159 ("[If the declarant] insists that he never observed the event . . . it is abundantly clear that in this situation cross-examination of the witness, as a practical matter, is scarcely more aid in testing the dependability of the alleged out-of-court statement than would be the cross-examination of A to test the veracity of an alleged statement of B."). *See also* notes 211-13 and accompanying text.
296. *See* Ruhala v. Roby, 379 Mich. at 113, 150 N.W.2d at 156.

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of-court statement, the opponent will have to call the declarant to the stand to question him about the statement. The court could then consider the declarant to be the opponent's witness, thus preventing the opponent from using leading questions and from impeaching the witness. The opponent, then, would not be able to effectively examine the declarant whose prior out-of-court statement may be very prejudicial to the opponent's case. Similiarly, if the declarant does not signify the truth or falsity of the out-of-court statement prior to its admission, then on cross-examination the declarant may claim lack of memory, duress, or even refute the statement. As a result, the cross-examiner is not given an opportunity to challenge the statement's substance because the declarant has not taken a position on the statements truthfulness of trial. The facts underlying the statement are, therefore, outside the scope of effective cross-examination. The proposed requirement will remedy these problems by ensuring the safeguard of effective cross-examination.

The final modification to the *Patterson* rule that should be made is to expand the trial court's authority by encouraging judges to balance the necessity for the prior statement against its probability of unreliability and undue prejudice to the opposing party. The trial judge should determine if the prior statement is essential to disclose important facts to the jury or if the statement is merely corroborative or bolstering in nature. If the statement is found to be introduced primarily to bolster similar testimony, the judge may reject the statement because its probative value is outweighed by its prejudice to the defendant.[297] Whenever the trial judge believes that more information in needed regarding the statement's benefits and harms before admitting it, the judge should be allowed and encouraged to call a conference outside the hearing of the jury to entertain arguments for and against the statement's admission.[298]

Encouraging judicial scrutiny over those statements that meet the newly proposed *Patterson* rule amendments[299] will give a trial court the flexibility to prohibit parties from employing the rule to admit

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297. *See* Gard, *Survey of Kansas Law—Evidence*, 12 KAN. L. REV. 239 (1963). Even admissible hearsay may be given weight which it does not deserve, and thereby becoming highly prejudicial. The trial judge may remedy this problem by invoking the 'best evidence' rule and thereby limit bolstering evidence. *Id.* at 247.

298. *See* Note, *Kansas District Court Rules—Anomalies of Code of Civil Procedure*, 6 WASHBURN L. J. 113 (1966). Seven of the Kansas District Courts created rules requiring a pre-trial conference when prior out-of-court statements were to be introduced into evidence. These courts could determine in advance whether the value of the hearsay outweighed its prejudice. *Id.* at 120.

299. *See supra* notes 287-96 and accompanying text.

non-probative or unreliable evidence. A trial court is in a position to determine the effect the hearsay statement will have in the case at bar. Therefore, that court should be given the responsibility and authority to balance the benefits of otherwise admissible out-of-court statements against their harmful effects and exclude such statements when their unreliability, lack of necessity, and prejudice to the defendant are very high. The Supreme Court of Indiana should formulate the precise standards to be used in this balancing test.[300]

The underlying policy for requiring prerequisites and other safeguards to the *Patterson* rule is to improve the reliability of hearsay evidence.[301] Without these restrictions, the *Patterson* rule has allowed unreliable out-of-court statements into evidence that could not be effectively cross-examined.[302] *Patterson* has permitted statements that are inadmissible on direct examination to be admitted into substantive evidence because they were in a hearsay form.[303] In addition, the *Patterson* rule tolerates the admission of manufactured statements that severly prejudice the defendant even though they do not add any additional substantive evidence to the case.[304] The problems created by the *Patterson* rule can be remedied by adding prerequisites that must be met before the rule may be utilized. The result would be a *Patterson* rule that permits reliable and valuable consistent out-of-court statements into substantive evidence while safeguarding against the inherent dangers of hearsay.[305]

VI CONCLUSION.

The *Patterson* rule marks Indiana's break with the traditional hearsay rule it adhered to for many years. The difficulty with implementing a liberal hearsay rule like *Patterson* is that the primary safeguard of reliability, i.e., cross-examination, is often sidestepped

300. Indiana does not have statutory evidentiary rules and, therefore, the Supreme Court of Indiana is the official source of new evidentiary rules. Whether statutory rules of evidence would be preferable to Indiana's existing common law system is beyond the scope of this note.

301. *See supra* notes 223-61 and accompanying text.

302. *See, e.g., Rapier*, ___ Ind. at ___, 435 N.E.2d at 35; *Arch*, 269 Ind. at 454, 381 N.E.2d at 468; *Moten*, 269 Ind. at 311, 380 N.E.2d at 546; *Williams*, 269 Ind. at 196, 379 N.E.2d at 453.

303. *See* Jordan v. State, ___ Ind. at ___, 432 N.E.2d at 14.

304. *See supra* notes 255-56 and accompanying text.

305. *See supra* note 43. The new *Patterson* rule would remedy the hearsay dangers that caused the English Courts of the early 1700's to prohibit the admission of out-of-court statements.

by introducing statements that are not amenable to effective cross-examination.[306] Consequently, these statements are allowed into evidence without any safeguard of reliability. The liberal *Patterson* rule also allows statements into evidence which are not probative to the case and which are extremely prejudicial to the opposing party. The problem is most appropriately viewed as how to prevent these hearsay dangers and still permit reliable, vital hearsay into evidence.

The solution to these problems is to limit the *Patterson* rule in those situations where cross-examination is not an effective safeguard and prohibit its use when the value of the hearsay evidence is outweighed by its prejudicial harm. Another safeguard of reliability is to allow the trial courts to restrict hearsay evidence that meets the improved *Patterson* rule requirements but is nevertheless too unreliable or too prejudicial to be admitted. The more restrictive *Patterson* rule proposed would create at least one reliability safeguard on all consistent out-of-court statements. Such a standard would be one more safeguard of reliability than the *Patterson* rule currently imposes on out-of-court statements.

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306. *See supra* note 302 and accompanying text.