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Evidence

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EVIDENCE

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RELEVANCY

Basic Principles

Although Louisiana statutory law with respect to the basic principles of relevancy is phrased in somewhat different terms than in the Federal Rules of Evidence,[1] the majority decision in *State v. Ludwig*,[2] authored by Justice Dennis, after careful analysis, concluded that the rules are very similar in substance. The basic proposition is that all evidence having any tendency in reason to establish a material proposition is relevant,[3] and that all relevant evidence is admissible unless a rule requiring its exclusion is found.[4] One such rule of exclusion, notes the court, is that

> the trial judge should exclude circumstantial evidence, even though logically relevant, if its probative value is outweighed by the risk that its admission will consume too much time, unnecessarily confuse the jury concerning the issues to be determined, tend to excite the emotions of the jury to the undue prejudice of the opponent, or unfairly surprise the opponent.[5]

In *Ludwig*, the defendant in a murder case sought to throw the blame on the wife of the victim and offered to show that six months prior to the victim's death, the victim's wife had shot the victim in the foot. The trial court excluded the evidence and the supreme court, over a dissenting opinion by Justice Lemmon, affirmed. The majority found that Louisiana, in *State v. Jenkins*,[6] had laid down a rule of admissibility, broader than that followed in most states in such cases, that "evidence incriminating a third person" is admissible "when such evidence would establish a reasonable hypothesis of that person's guilt or a reasonable doubt of the guilt of the defendant."[7] The majority recognized further that under the Louisiana Constitution of 1974[8] such a broad rule may be constitutionally required, and that there are also federal constitutional limitations to the exclusion in a criminal case of relevant, pro-defendant

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1. FED. R. EVID. 401-403.
2. 423 So. 2d 1073 (La. 1982).
3. LA. R.S. 15:435, :441 (1981); FED. R. EVID. 401.
4. *See* State v. Moore, 278 So. 2d 781 (La. 1973); FED. R. EVID. 402-403.
5. 423 So. 2d at 1079. It is to be noted that the Federal Rules of Evidence do not include surprise as a basis for exclusion under rule 403.
6. 134 La. 185, 63 So. 869 (1913).
7. 423 So. 2d at 1079.
8. LA. CONST. art. I, § 16.

evidence.[9] The court noted, however, that the defendant in *Ludwig* had not offered to show that the earlier shooting of the victim had been intentional, and concluded that the "probative value of evidence of a possibly accidental shooting six months before the charged offense was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, and undue delay or waste of time."[10] In his dissent from the original opinion and in his opinion dissenting from the denial of rehearing, Justice Lemmon argued that the evidence was sufficiently probative to be admissible and that in any event "[b]efore excluding the evidence, the trial court should have at least required the defendant, out of the presence of the jury, to show the circumstances surrounding the prior shooting."[11]

Ludwig is, of course, a difficult case. Because of the fear of convicting an innocent man, the desire to give the defendant every opportunity to make out his defense, and the state and federal constitutional protections designed to achieve these objectives, rarely indeed should reliable, probative, trustworthy evidence offered by the defense be excluded.[12] On the other hand, the defendant is not privileged gratuitously to inject red herring into the case. In the instant case, if there had been real substance to defendant's claim that the victim's wife had killed him, presumably greater evidence could have been offered by the defense than the seemingly random facts submitted.[13]

To be read along with *Ludwig* is the very important case of *State v. Vaughn*.[14] In an excellent opinion on rehearing, Justice Lemmon, speaking for four members of the court, held that the trial court had committed reversible error in refusing to permit the defendant to introduce extrinsic evidence to impeach the credibility of a state's witness. In a very persuasive analysis, the court said that under the circumstances of the case, to preclude the defendant from adducing the evidence denied him his constitutional right to produce relevant, nonprivileged evidence in his defense[15] and his constitutional right to confront and attack the credibility of the witnesses arrayed against him.[16] "When 'prejudice' to the pros-

9. *See* Chambers v. Mississippi, 410 U.S. 284 (1973). For a later Louisiana case following *Ludwig*, see State v. Parker, 436 So. 2d 495 (La. 1983).

10. 423 So. 2d at 1079.

11. *Id.* at 1080 n.2.

12. *See* Chambers v. Mississippi, 410 U.S. 284 (1973); State v. Vaughn, 431 So. 2d 358 (La. 1983).

13. In addition to the unexplained shooting incident, both the majority and the dissent note that the wife collected life insurance on her husband, and the dissenting opinion adds that the wife was 18 years older than the victim and that they had been married only a year at the time of his death.

14. 431 So. 2d 358 (La. 1983).

15. *See* U.S. CONST. amend. VI; LA. CONST. art. I, § 16.

16. *See* U.S. CONST. amend. VI; LA. CONST. art. I, § 16; Davis v. Alaska, 415 U.S. 308 (1974).

ecution is balanced against defendant's constitutional right to present relevant evidence in support of his defense, the balance should be weighed in favor of admissibility in those cases in which the prejudice is minimal."[17]

Extraneous Crimes to Show Intent for the Instant Crime

State v. Kahey[18] provides a very useful review of the Louisiana law relative to the admissibility of other crime evidence, summarizing exceptions thus far recognized to the general rule of exclusion. *Kahey* seemingly implies a continuation of a categorical approach to the creation of such exceptions.[19] The supreme court made clear, however, its unwillingness to adopt a "battered child" exception to the other crime exclusionary rule.[20]

Kahey reemphasizes that for other crime evidence to fit the so-called "intent" exception, intent must be a genuine issue in the case.[21] The defendants were charged with the murder of a twelve-year-old child who had lived with them, along with two other adults and twelve other children. In the opening statement, the defense attorney argued that the defendants (husband and wife) had had no intent to harm the deceased child and that instead the conduct leading to the victim's death had been part of their disciplinary scheme. The abused condition of the other children, said the court, was admissible to show that the injuries of the deceased had not been "inadvertent, accidental, unintentional, or without guilty knowledge."[22] The writers agree.

Character of Victim—Penalty Phase of Capital Case

Before detailing the various aggravating and mitigating circumstances[23] that under Louisiana law may be considered by a jury in determining whether to impose the death penalty in a capital case, the Louisiana Code of Criminal Procedure, in article 905.2, provides:

> The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence.

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17. 431 So. 2d at 370.

18. 436 So. 2d 475 (La. 1983).

19. *But see* State v. Goza, 408 So. 2d 1349, 1354 (La. 1982) (Lemmon, J., concurring). *See generally* Pugh & McClelland, *Developments in the Law, 1981-1982—Evidence*, 43 LA. L. REV. 413, 415 (1982).

20. *See generally* Pugh & McClelland, *supra* note 19, at 415 (discussion of the desirability of creating an exception as to other beatings of the same child).

21. *See* State v. Goza, 408 So. 2d 1349 (La. 1982); State v. Monroe, 364 So. 2d 570 (La. 1978); State v. Nelson, 357 So. 2d 1100 (La. 1978), *discussed in* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Evidence*, 39 LA. L. REV. 955, 960 (1979); *see also* State v. Prieur, 277 So. 2d 126 (La. 1973) (particularly note 2 and accompanying text).

22. 436 So. 2d at 489.

23. LA. CODE CRIM. P. arts. 905.4-.5.

> Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf.

May the prosecution in its initial presentation at the sentence hearing (analogous to its case-in-chief in the guilt-innocence phase of the trial) adduce evidence to show that the defendant is a person of bad character—aside from any claim that the evidence offered is independently relevant to show presence of one of the specified aggravating circumstances? Further, if character may thus be brought out by the prosecution, may it be evidenced by convictions of unrelated crimes?

In *State v. Sawyer*,[24] five of the seven members of the supreme court seemingly answer both questions in the affirmative.[25] In taking this position the majority relies heavily upon the language in the first sentence in article 905.2 that the sentence hearing shall focus on the "character and propensities" of the defendant. In separate concurring opinions, two members of the court vigorously protest this interpretation of the article, emphasizing that the second sentence stipulates that the "rules of evidence" apply, and of course under traditional rules the prosecution normally may not adduce evidence of bad character unless the defendant himself introduces evidence of good character.[26]

It seems to the writers that in determining the admissibility of the evidence under the approach suggested, the critical question is whether, under the Louisiana scheme, the character of the defendant is the ultimate, or one of the ultimate, issues at the first phase of the sentence hearing. The writers feel the statutory scheme contemplated that the aggravating circumstances specified in the statute constitute an exclusive listing of those aspects of the defendant's character that might be the subject of inquiry in the prosecution's case-in-chief at the sentence hearing. Having the

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24. 422 So. 2d 95 (La. 1982), vacated and remanded, 103 S. Ct. 356 (1983) (for further consideration in light of Zant v. Stephens, 103 S. Ct. 2733 (1983)).

25. It should be noted that in his opinion concurring in the denial of defendant's application for rehearing, Justice Lemmon, the author of the majority opinion, also takes the position that the evidence in question was admissible to show that defendant had "a significant prior history of criminal activity," one of the aggravating circumstances listed in article 905.4(c) of the Code of Criminal Procedure. This approach appears to have inherent constitutional problems. *See* Arnold v. State, 236 Ga. 534, 224 S.E.2d 386 (1976); State v. James, 431 So. 2d 399, 407 (La. 1983) (Blanche, J., concurrring). The problem was also noted by Justice Lemmon in State v. Robinson, 421 So. 2d 229, 231 n.1 (La. 1982).

26. *See* McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 447 (E. Cleary 2d ed. 1972) [hereinafter cited as McCORMICK ON EVIDENCE]; FED. R. EVID. 404; LA. R.S. 15:462, :481, :490-:491 (1981).

generalized attribute "bad character" is not one of the aggravating circumstances specified in the law, and thus, it is submitted that, at the first phase of the sentence hearing, bad character should not be considered an ultimate issue to be independently proved. Further, and perhaps particularly important, since bad character thus viewed is not an ultimate issue, even if it were admissible, it could not normally be evidenced by specific instances of misconduct.[27] Reputation evidence only would traditionally be permitted.[28] Under this line of reasoning, since character as such is not listed as an aggravating circumstance, its value in an evidentiary sense is merely inferential to prove one or more of the listed aggravating circumstances; hence, it is usually inadmissible.[29] However, the defendant (but not the prosecution), at his option, is sometimes permitted to open the door.[30] The reasoning of the majority in *Sawyer*, if logically extended, would seem to authorize inquiry into myriad, unrelated aspects of the defendant's past life, raising grave problems as to notice and hearing, confusion of the issues, and so forth.

The majority also indicated that the evidence in question was arguably admissible to negative in advance the presence of mitigating circumstances.[31] In the opinion of these writers, the prosecution, prior to rebuttal, should not be permitted to negative the possibility of mitigating circumstances, for this would open the door to yet more myriad extraneous issues. Mitigating circumstances should, it is believed, be regarded as matters of defense, circumstances the prosecution should be precluded from negating prior to rebuttal. Otherwise, the barn door would indeed be opened to the prosecution. The dangers seem particularly frightening when it is remembered that the last of the listed mitigating circumstances is "[a]ny other relevant mitigating circumstance."[32]

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

Admissibility of Hypnotically Induced Testimony

Should hypnotically induced testimony be received by the courts? The problem is a very significant one—much too large for adequate treatment here—and will be the subject of a student note to be published later in the *Louisiana Law Review*. Although the question was argued before the

27. *See* LA. R.S. 15:479-:481, :483 (1981); MCCORMICK ON EVIDENCE, *supra* note 26, § 190, at 447.

28. *See* MCCORMICK ON EVIDENCE, *supra* note 26, §§ 186, 190; LA. R.S. 15:479 (1981). The Federal Rules of Evidence (rule 405(a)) would broaden the inquiry to authorize personal opinion by the character witness.

29. *See* FED. R. EVID. 404.

30. LA. R.S. 15:480 (1981); FED. R. EVID. 404.

31. 422 So. 2d at 104 n.18; *see also* State v. Robinson, 421 So. 2d 229, 231 n.1 (La. 1982) (same suggestion).

32. LA. CODE CRIM. P. art. 905.5(h).

Louisiana Supreme Court in *State v. Wren*,[33] the court, because of the peculiar circumstances presented there, found it unnecessary to decide the issue. Coincidentally, both the Louisiana Fourth and Fifth Circuit Courts of Appeal were called upon to wrestle with the problem.

In *State v. Culpepper*,[34] the first of the cases decided this term by the Louisiana Courts of Appeal, the fifth circuit, relying upon the supreme court's handling of the lie detector question in *State v. Catanese*,[35] held that the issue should be resolved by a balancing test and concluded that at the present time hypnotically induced testimony offered by the prosecution should be held inadmissible. Apparently, the prosecution did not apply for writs to the Louisiana Supreme Court.

In the other court of appeal case, *Landry v. Bill Garrett Chevrolet, Inc.*,[36] the trial court, over objection, had received hypnotically induced testimony. The majority of the Louisiana Fourth Circuit Court of Appeal distinguished *Culpepper* as being a criminal case and concluded that the problem should be approached differently in a civil case; if a prescribed foundation were laid,[37] the testimony should be admitted. The court then remanded the case for further proceedings. Granting writs, a majority of the supreme court, in a brief memorandum opinion, reversed the court of appeal "concerning the hypnotically-enhanced testimony" and directed the appellate court to decide the case on the record before it—apparently favoring the reception of hypnotically induced testimony under the circumstances presented in *Landry*, and leaving the credibility issue to the wisdom of the fact finder.[38] Future "full-blown" opinions by the Louisiana Supreme Court addressing the complex issues in this troublesome area should be very helpful.

Right to Effective Cross-Examination by Attorney Unfettered by Conflict of Interest

Serious problems concerning the right of cross-examination may be presented when the same lawyer is appointed to represent two persons charged with committing the same crime and a conflict between the positions of the two clients develops. In *State v. Ross*,[39] the majority of the

33. 425 So. 2d 756 (La. 1983); *see also* State v. Moore, 432 So. 2d 209 (La. 1983).
34. 434 So. 2d 76 (La. App. 5th Cir. 1982).
35. 368 So. 2d 975 (La. 1979).
36. 430 So. 2d 1051 (La. App. 4th Cir. 1983).
37. That foundation should satisfy the trial court that: (1) the hypnosis was performed by competent qualified personnel; (2) that the method employed is acceptable in the community; (3) that the witness was not unduly influenced, or subjected to suggestions about issues material to the case; (4) that the witness did have a true memory loss prior to hypnosis, and that his testimony is essential to the case.

Id. at 1056-57.

38. 434 So. 2d 1103, 1105 (La. 1983).
39. 410 So. 2d 1388 (La. 1982).

Louisiana Supreme Court, speaking through Justice Ad Hoc Savoie, laid down a strong protective rule. After stating that the "mere possibility of conflict is insufficient to reverse a criminal conviction,"[40] the court went on to state that if an attorney "is required to cross-examine a witness who is testifying against the defendant and who was or is a client of the attorney"[41] and "if a defendant establishes that an actual conflict of interest adversely affected his lawyer's performance, he has demonstrated a violation of his Sixth Amendment rights under the [United States] Constitution and his Article I, Section 13 rights under the Louisiana Constitution of 1974."[42] Significantly, the court went on to say that "[i]f an actual conflict exists, there is no need for a defendant to prove that he was also prejudiced thereby. Showing of an actual conflict mandates reversal."[43]

ATTACKING CREDIBILITY OF WITNESSES

Access to Juvenile Records

Under what circumstances is the defense entitled to employ the juvenile record of a prosecution witness to attack the witness's credibility? The matter was before the Louisiana Supreme Court in *State v. Hillard* in 1981[44] and again in 1982.[45] At the murder trial of Hillard,[46] the defendant's alleged co-conspirator had testified for the prosecution, pursuant to a plea bargain, that the defendant had been the trigger man, a much controverted issue. To attack the witness's credibility, the defendant in the trial court had unsuccessfully sought to obtain access to the witness's juvenile record. On appeal in 1981, the supreme court had remanded the case, directing the trial court to determine whether the juvenile record was so probative as to the witness's credibility "that its admission was . . . necessary for a fair determination of defendant's guilt,"[47] and if so, to grant a new trial. The trial court, upon consultation of the record, concluded that the witness's juvenile record was not so probative on the issue of credibility as to require a new trial, and reinstated the conviction.

On a second appeal, the supreme court, in a very persuasive decision authored by Justice Blanche, concluded that under the circumstances, to prevent the defendant from utilizing the record to attack the credibility of the witness had been a denial of the defendant's rights of confronta-

40. *Id.* at 1390.
41. *Id.*
42. *Id.*
43. *Id. See also* State v. Rowe, 416 So. 2d 87 (La. 1982); State v. Edwards, 430 So. 2d 60 (La. 1983) (another case decided during the past year relative to an attorney's alleged conflict of interest).
44. 398 So. 2d 1057 (La. 1981).
45. 421 So. 2d 220 (La. 1982).
46. *Id.*
47. 398 So. 2d at 1061.

tion and cross-examination. The writers fully agree.[48]

Bias, Interest, Corruption—Rights of Confrontation and Cross-Examination

To be contrasted with *State v. Hillard*, where the court showed such scrupulous regard for the defendant's right of confrontation, is the disturbing case of *State v. Collar*.[49] Defendant Collar and the grandmother of the twelve-year-old victim of an alleged attempted forcible rape had lived in the same apartment building as next-door neighbors. The alleged victim, who for several days had been visiting her grandmother, claimed that the defendant caught her in the hall, pushed her into the grandmother's apartment, and attacked her. The twelve-year-old girl was obviously the prosecution's star witness. To impeach her testimony and to show that the entire matter had been fabricated to "get back at" the defendant, the defense vainly sought on three separate occasions to introduce testimony to show that several years before (in 1975), the defendant had "happened upon" the alleged victim's uncle (presumably the son of the grandmother) in the act of robbing the defendant's mother; that to protect his mother, the defendant had shot the victim's uncle; and further, that the defendant had given significant testimony at the trial convicting the uncle, who had been released from prison only two months before the alleged attempted rape.

In affirming the trial court's refusal to admit what seems to these writers extremely pertinent testimony to show bias, corruption, and possible ill will,[50] the supreme court in a unanimous decision said that the validity of the defendant's contention rested upon the theory that the alleged victim knew or believed the foregoing, and that "this premise was shown to be false—the victim testified that she had no knowledge of her uncle's conviction."[51]

With deference, it is submitted that the fact that the victim testified that she did not know of the above circumstances should in no sense

48. When the case was subsequently retried, the defendant was acquitted. According to a newspaper account of the trial, the alleged co-conspirator, who was then serving a fifteen-year prison term pursuant to the plea agreement, had refused to testify against Hillard at the second trial. The court found the witness in contempt of court and indicated it would impose a very long sentence. The witness, however, persisted in his refusal to testify. The prosecution was allowed, over defense objection, to introduce the transcript of the witness's testimony from the first trial. Morning Advocate (Baton Rouge), Aug. 25, 1983, at 14-E, col. 1.

49. 416 So. 2d 85 (La. 1982).

50. For prior discussion of bias, interest, and corruption, see Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Evidence*, 40 LA. L. REV. 779, 788 (1980); Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Evidence*, 38 LA. L. REV. 567, 577 (1978).

51. 416 So. 2d at 87.

have precluded the admissibility of the testimony. To the contrary, her denial of the very strong circumstances indicating a possible bias, interest, or corruption on her part was possibly necessary under the technical language of Louisiana Revised Statutes 15:492[52] as a prerequisite foundation for attacking her credibility on this ground. If the defendant's proffered testimony were true, it seems to these writers that there was a strong basis for inferring animosity between the defendant and the alleged victim's entire family. If the alleged victim were lying as to the attempted rape, as the defendant contended, she may well have lied as to knowledge of the prior incident. In any event, the existence of the anterior circumstances would indicate a basis for very "bad blood" between the alleged victim's family and the defendant and his family, giving credence to the defendant's claim of "frame-up." In the writers' opinion, denying the defendant the opportunity to show such basis for bias, interest, and corruption may well have denied him his state and federal constitutional rights of confrontation,[53] compulsory process,[54] and right to make out a defense.[55]

EXPERT WITNESSES

Expert Testimony as to Quality of Eyewitness Identification

In a problem *res nova* for Louisiana, the supreme court in *State v. Stucke*[56] affirmed the trial court's exclusion of defense testimony by an experimental psychologist offered by the defendant to testify to the weaknesses in eyewitness identification. Following decisions in other jurisdictions, the court concluded that "the prejudicial effect of such testimony outweighs its probative value because of the substantial risk that the potential persuasive appearance of the expert witness will have a greater influence on the jury than the other evidence presented during the trial."[57] In a concurring opinion, Justice Lemmon stated that although he agreed that under the circumstances presented the trial court had not abused its discretion, he felt that "it is not necessary to decide whether

52. LA. R.S. 15:492 reads:

> When the purpose is to show that in the special case on trial the witness is biased, has an interest, or has been corrupted, it is competent to question him as to any particular fact showing or tending to show such bias, interest or corruption, and unless he distinctly admit [sic] such fact, any other witness may be examined to establish the same.

53. U.S. CONST. amend. VI; LA. CONST. art. I, § 16; *see* Davis v. Alaska, 415 U.S. 308 (1973); State v. Hillard, 421 So. 2d 220 (La. 1982).

54. U.S. CONST. amend. VI; LA. CONST. art. I, § 16; Chambers v. Mississippi, 410 U.S. 284 (1972); State v. Martin, 304 So. 2d 328 (La. 1974).

55. U.S. CONST. amend. VI; LA. CONST. art. I, § 16; State v. Jones, 363 So. 2d 455 (La. 1978), *discussed in* Pugh & McClelland, *supra* note 50, at 814.

56. 419 So. 2d 939 (La. 1982).

57. *Id.* at 945.

the trial court must, under *all circumstances*, exclude such testimony as unhelpful to the trier of fact."[58] He further stated: "[T]rial courts should cautiously approach the question of admissibility of such evidence in each instance and decide whether, under the peculiar facts of the particular case, the 'specialized knowledge' of an expert in the form of opinion evidence would assist the jury in deciding the question of identity."[59]

Expert Testimony as to the Guilt or Innocence of the Defendant

Should a police officer, testifying as an expert with respect to a hypothetical set of facts, be permitted to express his opinion as to the likelihood of whether a particular individual would be engaged in the charged criminal conduct? The problem was squarely presented to the court in *State v. Wheeler*.[60] Relying upon *McCormick's Handbook of the Law of Evidence*[61] and numerous cases throughout the country, the majority of the court, in an opinion authored by Justice Dennis, answered clearly in the negative. The court analyzed the variables that should be considered by a trial court in determining whether expert evidence should be received. With respect to what it called the third variable,[62] "the preference for direct, concrete testimony and the reluctance to admit opinions and inferences as to matters crucially at issue,"[63] the court stated:

> The officer's testimony was tantamount to an opinion that the defendant was guilty of distribution of marijuana. As the subject matter of the opinion approaches the hub of the issue, the risk of prejudice and hence of reversible error consequently increases. This is particularly so when the witness expressing the opinion is one, such as a police officer, in whom jurors and the public repose great confidence and trust. Under these circumstances, it is clear that a substantial right of the defendant has been violated,

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58. *Id.* at 951.

59. *Id.*

60. 416 So. 2d 78 (La. 1982). *See* State v. Montana, 421 So. 2d 895 (La. 1982) (following the *Wheeler* approach). In *Wheeler*, over objection, the police officer was asked, "In your expert opinion what is the likelihood of this individual being involved in the distribution of marijuana?" 416 So. 2d at 79. The officer in response stated, "In my opinion the person would be involved in the distribution of marijuana . . . ." *Id.*

61. MCCORMICK ON EVIDENCE, *supra* note 26, § 12, at 26.

62. The court listed the other two variables as follows:

> First, the terms "fact" and "opinion" denote merely a difference of degree of concreteness of description or a difference in nearness or remoteness of inference. The opinion rule operates to prefer the more concrete description to the less concrete, the direct form of statement to the inferential. Second, the purpose for which the testimony is admitted should have an effect upon the degree of concreteness required.

416 So. 2d at 80.

63. *Id.*

> and that there is a reasonable possibility that the errors contributed to his conviction.[64]

The writers fully agree.

PRIVILEGE

Physician-Patient Privilege

A fascinating, and what seems to these writers totally unforeseen, problem with respect to the application of the physician-patient privilege was presented to all levels of Louisiana courts in *Arsenaux v. Arsenaux*.[65] Plaintiff wife in *Arsenaux* sued for a judicial separation from her husband on the grounds of abandonment. Claiming that she was free from fault, she sought alimony, and in addition sought custody of a minor child and child support. The husband reconvened and prayed for a divorce on the grounds of adultery. To counter his wife's claim and establish his own, defendant husband sought to show that some two years following his vasectomy, his wife had become pregnant and had an abortion. He was, however, blocked in this effort by the wife's successful assertion in the trial court of the recently adopted health care provider privilege for civil cases[66] and her claimed constitutional right to privacy. From a judgment on the merits in favor of plaintiff wife on the aforementioned demands, the defendant appealed. Although successful on this point in the court of appeal, the defendant lost in a four to three decision by the Louisiana Supreme Court. Concluding that the case did not fall within any of the exceptions in the clearly drawn health care provider statute, the majority found that "an additional judicial exception would contravene the statute and flout the law."[67] In addition, the court, relying upon state and federal authorities relative to right to privacy,[68] stated that "there are strong constitutional considerations weighing against admission of this evidence."[69] The three dissenting justices argued that by claiming that she was free from fault, the plaintiff had "waived" her privilege to exclude the evidence.

The problem is exceptionally difficult. It seems to the writers that had the Legislature considered the matter, it would not have intended such a result, *i.e.*, it would not have permitted a wife on the one hand

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64. *Id.* at 82.

65. 428 So. 2d 427 (La. 1983).

66. LA. R.S. 13:3734 (Supp. 1983).

67. 428 So. 2d at 430.

68. In this connection the court cited LA. CONST. art. I, § 5; Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973); L. WARDLE, THE ABORTION PRIVACY DOCTRINE: A COMPENDIUM AND CRITIQUE OF FEDERAL COURT ABORTION CASES (1980).

69. 428 So. 2d at 430.

to contend in a suit for separation that she was free from fault and in consequence to be awarded alimony, and on the other, block admission of evidence that if believed would establish her adultery. In very analogous situations (wrongful death, personal injury, and workmen's compensation actions), the statute specifically provides that the health care provider privilege is unavailable. Would it have been appropriate for the court to interpret the listing of exceptions as non-exclusive, and then by analogy to recognize a further exception to cover this type of case? Although the matter is not without great difficulty—especially in view of the fact that the statute was recently enacted and carefully drawn—the writers feel that such would have been preferable. Alternatively, it is felt that it would have been desirable, as contended by the three dissenting justices, for the court to have held that plaintiff, by praying for alimony for herself, "waived" the physician-patient privilege. In a very analogous context, despite broad, embracive language creating the physician-patient privilege for criminal cases, the court found that by pleading not guilty by reason of insanity, a defendant "waives" his physician-patient privilege,[70] or alternatively, that the statute was not intended to cover such a situation.[71] Similarly, with respect to the attorney-client privilege[72] and the rape shield statute,[73] the court limited the legislation's impact to instances deemed to fall within what was believed to be their intended scope.[74]

Although rooted in weighty policy considerations, testimonial privileges by their nature thwart the ascertainment of truth. Since they bear so trenchantly upon the historic role of courts, fact-finding and justice-doing, it is submitted that statutes in this area should be peculiarly susceptible of judicial interpretation in light of the policy objectives sought to be achieved by the legislature. In any event, the question should be addressed in the preparation and enactment of a Code of Evidence for Louisiana. In considering the matter, thought should also be given to the suggestion

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70. State v. Felde, 422 So. 2d 370 (La. 1982); State v. Aucoin, 362 So. 2d 503 (La. 1978); State v. Berry, 324 So. 2d 822 (La. 1975).

71. *See* cases cited *supra* note 70.

72. LA. R.S. 15:475 provides:

> No legal advisor is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communications made to him as such legal advisor by or on behalf of his client, or any advice given by him to his client, or any information that he may have gotten by reason of his being such legal advisor.

73. LA. R.S. 15:498 provides: "Evidence of prior sexual conduct and reputation for chastity of a victim of rape or carnal knowledge shall not be admissible except for incidents arising out of the victim's relationship with the accused."

74. *See* State v. Hayes, 324 So. 2d 421 (La. 1975), *discussed in* Pugh & McClelland, *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 593 (1977), *reprinted in* G. PUGH, LOUISIANA EVIDENCE LAW 206 (Supp. 1978); State v. Langendorfer, 389 So. 2d 1271 (La. 1980), *discussed in* Pugh & McClelland, *Developments in the Law, 1980-1981—Evidence*, 42 LA. L. REV. 659, 661 (1982).

in the majority opinion in *Arsenaux* that the physician-patient privilege in this context may be constitutionally compelled.[75] *Arsenaux* is to be the subject of a student note in a forthcoming issue of this *Review*.

Juror Testimony to Impeach Verdict

In sweeping, embracive language, Louisiana Revised Statutes 15:470 states that a petit juror is incompetent to "testify to his own or his fellows' misconduct, or to give evidence to explain, qualify or impeach any indictment or any verdict found by the body of which he is or was a member."[76] Constitutional considerations have, however, eroded the prohibition,[77] and the court in *State v. Graham*,[78] in a nice summary of the current law, states:

> [i]t is now clear that the statute must yield and that our courts are required to take evidence upon well pleaded allegations of prejudicial juror misconduct violating an accused's constitutional right to due process, to confront and cross-examine witnesses or to a trial by a fair and impartial jury and to set aside the verdict and order a new trial upon a showing that a constitutional violation occurred and that a reasonable possibility of prejudice exists.[79]

The court made clear, however, that the article has continued validity insofar as prohibiting "inquiry into the mental processes of an individual juror."[80] In this regard, it accords with Federal Rule of Evidence 606. Clearly differentiating the evidentiary question from the issue as to whether a new trial should be granted,[81] the court then set down a very wise test:

> [W]hen a juror passes beyond the record evidence in reaching a decision, whether a new trial will be granted depends upon the magnitude of the juror's deviation from his proper role, the degree to which the accused was deprived of the benefits of the constitutional and statutory safeguards, and the likelihood that the impropriety influenced the jury's verdict.[82]

Again reflecting the court's unwillingness to violate the deliberative pro-

75. *See* Caesar v. Mountanos, 542 F.2d 1064 (9th Cir. 1976); United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038 (E.D.N.Y. 1976); Roe v. Ingraham, 403 F. Supp. 931 (S.D.N.Y. 1975), *rev'd sub nom.* Whalen v. Roe, 429 U.S. 589 (1977); *see also* Felber v. Foote, 321 F. Supp. 85 (D. Conn. 1970).

76. The article also applies to testimony by grand jury.

77. Durr v. Cook, 589 F.2d 891 (5th Cir. 1979), *discussed in* Pugh & McClelland, *Developments in the Law, 1979-1980—Evidence*, 41 LA. L. REV. 595, 612-13 (1981); State v. Sinegal, 393 So. 2d 684 (La. 1981), *discussed in* Pugh & McClelland, *supra* note 74, at 668.

78. 422 So. 2d 123 (La. 1982).

79. *Id.* at 131.

80. *Id.* at 132.

81. *Id.*

82. *Id.*

ceedings of a jury, the court in *State v. Copeland*[83] held inadmissible testimony that during jury deliberations, one juror had threatened another when the latter requested that the jury deliberate as to whether it should return a verdict of not guilty and not guilty by reason of insanity.

Forcing Assertion Before Jury

In *State v. Edwards*,[84] a unanimous Louisiana Supreme Court rejected the defendant's efforts to force a co-indictee (who was to be separately tried later) to assert a privilege against self-incrimination in the presence of the jury.[85] The defendant argued that since the prosecution, via an immunity grant, or a reduction in charges, can normally force a witness to testify over a claim of the privilege against self-incrimination, the defendant should at least be able to force a claim of privilege in the presence of the jury.[86] Not so, said the court, following the direction earlier suggested in *State v. Day*.[87] In rejecting the defendant's argument, the court stated that due process does not require that the prosecution and the defense be accorded "identical rights with respect to each issue or trial aspect."[88] It suffices that "each is accorded rights, powers and opportunities consistent with the burden of each side, the function of each side and consistent with fairness."[89]

HEARSAY

State of Mind of the Victim

Are statements by a victim made a short time before her death, evidencing fear on her part of the defendant, admissible to show subsequent contact between the two? Relying on *State v. Raymond*,[90] the court

83. 419 So. 2d 899 (La. 1982). *See* Riche v. Juban Lumber Co., 421 So. 2d 318 (La. App. 1st Cir. 1982) (civil case dealing with same issue).

84. 419 So. 2d 881 (La. 1982).

85. In the instant case, pursuant to a procedure earlier approved by the court, State v. Berry, 324 So. 2d 822 (La. 1975), *discussed in* Pugh & McClelland, *supra* note 74, at 598, *reprinted in* G. PUGH, *supra* note 74, at 237 (Supp. 1978), the trial court, outside the presence of the jury, had ascertained that the co-indictee was entitled to the privilege and would assert it.

86. For a discussion of the problem, see Pugh & McClelland, *supra* note 19, at 429-31. *See also* State v. Ortiz, 113 Ariz. 60, 546 P.2d 796 (1976).

87. 400 So. 2d 622 (La. 1981), *discussed in* Pugh & McClelland, *supra* note 19, at 429. The court in *Edwards*, inter alia found without merit defendant's contention that one of the co-indictees had been "overcharged" for the purpose of depriving defendant of the opportunity to use her as a witness.

88. 419 So. 2d at 893.

89. *Id.*

90. 258 La. 1, 22, 245 So. 2d 335, 342 (1971) (Tate, J., concurring), *discussed in* Pugh, *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Evidence*, 32 LA. L. REV. 344, 353 (1972), *reprinted in* G. PUGH, *supra* note 74, at 425 (1974).

in *State v. Tonubbee*[91] gives an affirmative response. The court said that the testimony in question was not subject to a hearsay objection, that it was nonhearsay, circumstantial evidence of the state of mind of the victim. The statement by the victim occurred less than an hour before her death, apparently in the presence of the defendant, while she and the defendant were in the same bar and shortly before they left together, and in context indicated that the two were quarreling. The statement was not accusatory in character and in no sense related backward. Since the statement came so close to the death of the victim and was made while she and the defendant were seated together at a bar, it had a peculiar pertinence to the crime, and many courts would have declared it part of the res gestae.[92]

In the opinion of the writers, the statement was properly admissible as nonhearsay, not to show the state of mind of the victim as tending to show what the defendant thereafter did, but as a fact from which one could infer that at the time of the statement, an hour before her demise, the victim and the defendant were quarreling, and to show state of mind of the defendant. The court's reliance upon *State v. Raymond* is disturbing; *Raymond's* authority appeared later to have been limited by the court,[93] and it would be unfortunate, we believe, if now *Raymond* were to be given renewed vigor. There are difficulties inherent in admitting out-of-court statements by a declarant tending to show what another person, the defendant, thereafter did,[94] and it is hoped that this aspect of the *Tonubbee* case will not be expanded to cover less appealing situations.

Statements of Present Physical Pain

Since physical pain is very subjective, it is not always easy to establish, and yet in a personal injury suit it is an element of damage. Because of the need for the evidence and the fact that natural and spontaneous statements of pain are usually trustworthy even when given to a layman, they were made the subject of a hearsay exception at common law.[95] Citing *McCormick*, the exception was recognized and accepted in *Robinson v.*

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91. 420 So. 2d 126, 135 (La. 1982).

92. *See* State v. Ford, 259 La. 1037, 254 So. 2d 457 (1971); State v. Reese, 250 La. 151, 194 So. 2d 729, *cert. denied*, 389 U.S. 996 (1967); State v. Johnson, 249 La. 205, 186 So. 2d 565 (1966).

93. *See* State v. Weedon, 342 So. 2d 642 (La. 1977), *discussed in* Pugh & McClelland, *supra* note 50, at 584.

94. *See* Pugh & McClelland, *supra* note 19, at 434; Pugh & McClelland, *supra* note 74, at 669-70; Pugh & McClelland, *supra* note 77, at 614; Pugh & McClelland, *supra* note 50, at 584-85; Pugh, *supra* note 90, at 352-55, *reprinted in* G. PUGH, *supra* note 74, at 425 (1974).

95. *See* MCCORMICK ON EVIDENCE, *supra* note 26, § 291, at 689; 6 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1718-1723 (J. Chadbourn rev. ed. 1976); *see also* FED. R. EVID. 803(3).

F.W. Woolworth & Co.[96] This is in accord with Federal Rule of Evidence 803(3).

PRE-TRIAL DETERMINATION OF EVIDENTIARY ADMISSIBILITY

Under certain circumstances, it is critically important for the prosecution in a criminal case to ascertain in advance of trial whether certain evidence will later be held admissible. *State v. Verrett*,[97] especially when read in light of Justice Lemmon's concurring opinion, demonstrates the willingness of the supreme court to approve a procedure designed to achieve that objective.

In *Verrett*, the prosecution in its opening statement referred to statements by the victim which it planned thereafter to introduce as a dying declaration. Following the trial court's granting of a mistrial, the prosecution filed a motion to obtain a trial court ruling that at a second trial of the defendant the testimony in question would be admissible as the victim's dying declaration. When, without taking evidence, the trial court ruled that the statements would be inadmissible, the supreme court, at the behest of the prosecution, granted writs and held that the evidence in question would indeed be admissible as contended by the prosecution.

As pointed out by Justice Lemmon in his concurring opinion, although such a pretrial motion is not expressly authorized by the Code of Criminal Procedure, it may be utilized under the authority of article 3,[98] as had been earlier indicated by the court.[99] He argued persuasively, however, that the trial court should have held a hearing and taken evidence on the matter. In the opinion of the writers, the procedure followed in *Verrett*, when modified by the hearing suggested by Justice Lemmon, is excellent. The procedure, however, should not be abused, for it would then unduly encumber the dockets of the courts.

Because of the prosecution's inability to appeal from an acquittal, the procedure is especially appropriate when invoked by the prosecution. It seems that it should also at times be appropriately available to the defense.[100] In addition to the factual setting in *Verrett*, it is believed that it would also be very appropriate when the prosecution seeks reconsideration of a particular appellate court precedent holding certain evidence inadmissible. Rather than flout the authority of the precedent and perhaps

96. 420 So. 2d 737, 741 (La. App. 4th Cir. 1982).

97. 419 So. 2d 455 (La. 1982).

98. Article 3 provides: "Where no procedure is specifically prescribed by this Code or by statute, the court may proceed in a manner consistent with the spirit of the provisions of this Code and other applicable statutory and constitutional provisions."

99. *See* State v. Humphrey, 381 So. 2d 813 (La. 1980); State v. Wilkerson, 261 La. 342, 259 So. 2d 871 (1972).

100. *See* State v. Humphrey, 381 So. 2d 813 (La. 1980).

precipitate mistrial or retrial, it seems much more desirable for the prosecution to follow the procedure outlined by Justice Lemmon in his concurring opinion.

PRESERVING RIGHTS ON APPEAL

Contemporaneous Objection Rule—Other Crime Evidence in Otherwise Admissible Confession

State v. Morris[101] is a very important case, reflecting a rigorous application of the technical requirements of the contemporaneous objection rule[102] as traditionally formulated.[103] The case demonstrates that every trial lawyer should make every effort to become thoroughly familiar with the intricacies of this exacting rule. Mrs. Morris was on trial for the murder of her infant child. In an earlier consideration of the case,[104] the supreme court had held inadmissible evidence that three years prior to the death of the infant in the instant case, the defendant had pleaded guilty to manslaughter of another of her children, then three months old, and that six years prior to that the defendant had pleaded guilty to two instances of aggravated battery on yet another of her children, one then six months old.

In the instant proceeding, the prosecution, over objection, introduced testimony that after the child was taken to the hospital, the defendant, prior to being advised by the police that she was under suspicion, told a hospital employee, "Oh Lord, I have done it again. Tell me he is not dead too."[105] The supreme court held that apart from the reference in the statement to another crime, the incriminating statement was admissible, that defendant had the option of insisting that the reference to the other crime be excised from the statement, but she did not have the right to have the entire statement excluded. Thus, the court held that, in order to protect his client, defense counsel had to not merely object to the offered statement, but also had to move to excise that portion of the statement referring to other crime evidence. As noted above, this holding is in accord with traditional rules.[106]

Interestingly, if the trial court had instead held the statement inadmissible because it contained inadmissible aspects, and the state had taken

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101. 429 So. 2d 111 (La. 1983).

102. For recent discussions of the contemporaneous objection rule, see Pugh & McClelland, *supra* note 74, at 672-74; Pugh & McClelland, *supra* note 77, at 621-22.

103. *See* MCCORMICK ON EVIDENCE, *supra* note 26, § 52, at 117.

104. 362 So. 2d 1379 (La. 1978), *discussed in* Pugh & McClelland, *supra* note 50, at 781.

105. 429 So. 2d at 115, 121.

106. *See* MCCORMICK ON EVIDENCE, *supra* note 26, § 52, at 117; 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 9, at 43 (1977).

writs, the trial court under traditional rules would have been upheld,[107] for to secure relief in an appellate court, an unsuccessful offering party must generally show that the evidence offered was not subject to a valid objection. Thus the traditional rules in this area, in tandem, seek mightily to affirm the action of the trial court.[108]

The very exacting application of the intricacies of the contemporaneous objection rule in *State v. Morris* proved very costly to the defendant, and it is possible that in light of the United States Fifth Circuit Court of Appeal action in an analogous case,[109] federal courts on collateral attack might afford some form of relief.

EVIDENTIARY RULES APPLICABLE IN ADOPTION PROCEEDINGS

Confidential Reports Prepared by the Department of Health and Human Resources

In adoption proceedings, it is obviously very important for the trial judge to have complete and reliable information about the parties involved. In light of this circumstance, the Louisiana Revised Statutes relative to adoption provide for confidential reports to be prepared by the Department of Health and Human Resources for submission to the trial judge for his *sole* consideration.[110] There are grave due process problems inherent in such a statute, and the matter was before the court in two cases decided during the past year.[111]

In *Hargrave v. Gaspard*,[112] the first of the two cases, a divided supreme court, in part relying on the notion that adoption is a "privilege," and balancing the interests involved, upheld consideration of the confidential report by the trial judge and denial of access to same by the prospective adopting parents and the intervening relatives of the biological mother. A very forceful dissent by Chief Justice Dixon, joined in by Justice Calogero, took the position that due process required access, that the trend of the case law throughout the country is in favor of access, and that the procedure provided in the statute is analogous to Star Chamber proceedings.

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107. *See* MCCORMICK ON EVIDENCE, *supra* note 26, § 52, at 116; D. LOUISELL & C. MUELLER, *supra* note 106, § 14.

108. *See* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 101, at 383-84 (1978).

109. Nero v. Blackburn, 597 F. 2d 991 (5th Cir. 1979), *discussed in* Pugh & McClelland, *supra* note 50, at 779-81.

110. LA. R.S. 9:427 provides in part: "The department shall study the proposed adoption and submit a confidential report of its findings to the judge." LA. R.S. 9:437(A) provides in part: "No one except the judge presiding in the case, or his successor, shall have access to the confidential report rendered to the judge by the department."

111. Hargrave v. Gaspard, 419 So. 2d 918 (La. 1982); *In re* MDA, 427 So. 2d 1334 (La. App. 2d Cir. 1983).

112. 419 So. 2d 918 (La. 1982).

In the second case, *In re MDA*,[113] the second circuit without noting any distinction between *In re MDA* and the *Hargrave* case, applied the statute to deny a nonacquiescing biological parent access to the confidential report. It noted, however, that:

> [B]ecause of the nature of the information upon which such reports are based and because they deprive the trial court of the opportunity to personally see, hear and evaluate the credibility of the persons who give the information upon which the reports are based, such reports should be given substantially less weight than the sworn testimony of live witnesses at trial.[114]

The writers are thoroughly committed to traditional notions underlying Anglo-American judicial procedure, at the core of which are the rights of confrontation, cross-examination, and compulsory process. Although the state certainly has a great interest in protecting the child and the identity of the informants, the writers believe that in this context, truth is more likely to emerge if interested parties are given the right to ascertain and attempt to controvert the findings submitted by the agents of the Department of Health and Human Resources. Although it is probably proper to make an exception to the hearsay rule in this setting and to provide some testimonial privilege, adequate adversarial safeguards should be provided. To deny litigants access to such reports is, we believe, very dangerous to the ascertainment of truth. This is especially dangerous, it seems, when the rights of nonacquiescing biological parents are in issue.

HARMLESS ERROR

Article 921 of the Code of Criminal Procedure as reformulated in 1979[115] provides that "[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused." There is a clear negative implication that if an erroneous ruling results in a violation of a substantial right of an accused, his conviction is to be reversed. What are these "substantial rights" of a defendant and when are they to be deemed violated? It seems to the writers that in the very recent past there has been a shift towards relaxation of the standard. The change was alluded to by the Louisiana Fourth Circuit Court of Appeal in *State v. Banks*.[116] After recapitulating the "harmless error" test laid down in *State v. Gibson*,[117] the court stated that:

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113. 427 So. 2d 1334 (La. App. 2d Cir. 1983).

114. *Id.* at 1337.

115. For a discussion of the impact of the 1979 amendment, see Pugh & McClelland, *supra* note 77, at 622.

116. 428 So. 2d 544 (La. App. 4th Cir. 1983).

117. 391 So. 2d 421 (La. 1980). The court in *Banks* said the following concerning the *Gibson* test:

> Since *Gibson*, however, several decisions have recognized a second device for weighing the effect of erroneously admitted evidence.
>
> Those cases hold that where erroneously admitted evidence is merely "cumulative" with that which was properly admitted at trial, a reviewing court will be warranted in finding the tainted evidence harmless beyond a reasonable doubt.[118]

Consideration of decisions of the Louisiana appellate courts in criminal cases reported during the past year has convinced the writers that the courts, especially the courts of appeal, are far more likely than in the past to characterize trial court erroneous rulings as "harmless error."[119] To the writers, the matter is very disturbing.[120] It is extremely important in a government of law and not of men that a trial—especially a criminal trial—be conducted in accordance with preestablished principles. Although a criminal justice system needs a "harmless error" doctrine to take care of merely technical errors that clearly have no impact upon the ultimate disposition of the case, an overly generous rule may create an atmosphere that has the effect of encouraging the bending or breaking of the rules of evidence and procedure because of a perceived decreased risk of reversal.[121] Prosecutors are paid professionals whom society and the courts may justly hold to know and follow the law, including the rules of evidence. In reversing a conviction in a particular case, the appellate court not only provides a new trial for the defendant whose rights have been violated, but signals to prosecutors and trial judges that future such errors will necessitate a like result.[122] However, reversing a costly conviction and ordering a new trial is not an ideal way to enforce a rule of evidence or to clear up a doubtful one, particularly in an era in which the public fears that the law is already too "soft" on crime. As demonstrated in *State v. Verrett*,[123] the system should and can evolve pro-

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> In *State v. Gibson* . . . the Supreme Court of Louisiana adopted the "harmless error" test first announced in *Chapman v. California* . . . . Application of that standard requires the reviewing court to focus on the erroneously admitted evidence to determine whether there is a reasonable possibility that the error complained of contributed to the verdict obtained. The burden is on the prosecution to demonstrate that, beyond a reasonable doubt, the error did not contribute to the finding of guilt.

428 So. 2d at 546 (citations and footnote omitted).

118. *Id.*

119. For a discussion of the doctrine in Louisiana, see State v. Gibson, 391 So. 2d 421 (La. 1980); Pugh & McClelland, *supra* note 77, at 613, 622; Comment, *Harmless Constitutional Error—A Louisiana Dilemma?*, 33 LA. L. REV. 82 (1972), *reprinted in* G. PUGH, *supra* note 74, at 550 (1974).

120. *See* Pugh & McClelland, *supra* note 77, at 613, 622, and authorities cited therein.

121. *See* State v. Michelli, 301 So. 2d 577, 579-80 (La. 1974).

122. *Id.*

123. *See supra* text accompanying notes 97-100.

cedures that permit a prosecutor to determine in advance whether particular critical evidence will be held admissible at trial.

State v. Banks seems to the writers an inappropriate application of the "harmless error" rule. In a prosecution for possession of heroin, the trial court, over objection, permitted a police officer to testify that he had received a telephone call from a confidential informant that the defendant was at a designated location in New Orleans and would be receiving heroin from an out-of-state distributor. The court very properly held that the testimony was inadmissible hearsay.[124] It then went on to hold, however, that the admission of this hearsay evidence was "harmless error." Three officers testified that they had gone to the location in question, observed the defendant, and on approaching him saw him take a package (thereafter found to contain heroin) from his pocket and drop it on the ground. The defendant produced a witness who "stated that the package had not been thrown down by Banks, but by an unknown man who was walking only a few feet in front of Banks as the police approached."[125] Declaring the inadmissible hearsay evidence "merely cumulative" because of the properly admitted testimony, the court of appeal held its admission "harmless beyond a reasonable doubt."[126] With deference, the writers submit that the admission of the hearsay testimony should not have been classified "harmless." The inadmissible testimony that the officers went to the location in question to look for Banks because he would shortly be in possession of heroin seems to have lent great support to the officers' testimony that it was Banks and not the other person, who dropped the package containing heroin. To permit the introduction, over objection, of this inadmissible hearsay identification is, it is submitted, a violation of a substantial, perhaps even a constitutional,[127] right and in context should not be properly characterized as "harmless."

Even more disturbing to these writers on the "harmless error" question is *State v. Small*.[128] In *Small*, a unanimous court of appeal upheld an armed robbery conviction despite a number of improprieties that occurred at the trial. As to five separate assignments of error, the appellate court agreed with defense counsel that the trial court erred in overruling the defendant's objection to hearsay testimony; however, the court found

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124. *See* Pugh & McClelland, *supra* note 74, at 668.

125. 428 So. 2d at 545.

126. *Id.* at 547.

127. *See* Favre v. Henderson, 464 F.2d 359 (5th Cir.), *cert. denied*, 409 U.S. 942 (1972); United States *ex rel.* Favre v. Henderson, 444 F.2d 127 (5th Cir. 1971); Favre v. Henderson, 318 F. Supp. 1384 (E.D. La. 1970).

128. 427 So. 2d 1254 (La. App. 2d Cir. 1983). For another case that is disturbing to us on the harmless error question, see State v. Billiot, 421 So. 2d 864 (La. 1982) (applying a "evidence of guilt overwhelming" test). To be contrasted with *Billiot* are State v. Gibson, 391 So. 2d 421 (La. 1980), and State v. Michelli, 301 So. 2d 577 (La. 1974).

that reception of the evidence was "harmless error," adopting a "merely cumulative—corroborative" test. Further, two other assignments of error, apparently also based on the hearsay rule, were awarded "harmless error" treatment. As to three additional assignments of error, the court found that the challenged admitted testimony was not hearsay but that even if it were inadmissible hearsay, its admission was "harmless error."[129]

The summary of the facts in the *Small* case given by the court before discussing the defendant's assignments of error is persuasive indication that much of the evidence against the defendant heard by the jury was inadmissible hearsay. The defendant, it is submitted, was entitled to have his case heard by the jury without their exposure to the very damaging inadmissible evidence. The writers find it difficult to believe that the defendant's substantial rights were not violated. In both *Banks* and *Small*, the rights of the defendants seem so substantial that it may be seriously questioned whether their state and federal rights of confrontation were not violated.[130]

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129. In an eleventh assignment of error, the appellate court found that the defendant had not been entitled to a mistrial when the trial court sustained defense counsel's objection to the prosecution's questioning a police officer about "his involvement in the recent 'ski mask rapist' case involving John Simonis," 427 So. 2d at 1264, "and gave an emphatic and detailed admonition to the jury to totally disregard the question asked [of the witness]." *Id.* at 1265. In this connection the appellate court stated that "[i]n asking that question, the record clearly reveals the state made no attempt by innuendo to connect defendant to the commission of that notorious offense." *Id.* The court did not speculate as to what might have prompted the prosecutor to make this reference to the Simonis affair.

130. *See* cases cited *supra* note 127; State v. Hillard, 421 So. 2d 220 (La. 1982), discussed *supra* text accompanying notes 44-48; State v. Michelli, 301 So. 2d 577 (La. 1974).