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Procedure: Evidence

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EVIDENCE

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RELEVANCY

Connexity—Identity and Proof of Prior Conviction

The fact that a person has been previously convicted may be relevant and admissible for several distinct purposes—for example, to provide the basis for sentencing the defendant under the general statute relative to habitual offenders;[1] to prove that the defendant should be found guilty of driving while intoxicated, second offense;[2] to impeach a witness by prior convictions;[3] and perhaps, as in the Federal Rules of Evidence,[4] to prove a fact underlying the conviction.[5]

Assuming that in a particular case a prior conviction of a person is relevant and admissible, how is the identity of the person involved in the instant proceeding and that of the person previously convicted to be proved? Is the coincidence of name alone sufficient for admissibility or must this circumstance be "connected up" with other evidence? The problem is fraught with difficulty.[6]

In *State v. Curtis*[7] the supreme court held in an habitual offender proceeding that coincidence of name is not alone sufficient to make a prima facie showing of identity. In 1976, one year later, when the *Curtis* case was again before the court,[8] the court made clear that in addition to the method provided statutorily for such cases,[9] other methods may be utilized:

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1. LA. R.S. 15:529.1 (Supp. 1956).

2. *Id.* 14:98 (Supp. 1975). *See* State v. Neal, 347 So. 2d 1139 (La. 1977); State v. Benoit, 311 So. 2d 857 (La. 1975).

3. LA. R.S. 15:495 (Supp. 1952).

4. FED. R. EVID. 803(22).

5. Whether or not such an exception to the hearsay rule is generally available in Louisiana is not clear. See in this connection the text at notes 193-200, *infra*.

6. *See* 9 J. WIGMORE, EVIDENCE § 2529 (1940).

7. 319 So. 2d 434 (La. 1975).

8. State v. Curtis, 338 So. 2d 662 (La. 1976).

9. LA. R.S. 15:529.1(F) (Supp. 1956) provides: "The certificate of the warden or other chief officer of any state prison, or of the superintendent or other chief officer of any penitentiary of this state or any other state of the United States, or of

> Various methods of proof to establish identity have been recognized. We do not consider that identity of name of defendant and the person previously convicted is sufficient evidence of identity. Identification of the accused may be by testimony of witnesses, by expert opinion as to the fingerprints of the accused when compared with those in the prison record introduced, or by photographs contained in the duly authenticated record.[10]

Relying in part on the second *Curtis* case, the court in *City of Monroe v. French*[11] held in a driving while intoxicated, second offense, case that unless the state is prepared to adduce evidence further linking the defendant to the person with the same name in the prior proceeding, the prior conviction is inadmissible. The court in *French* went on to say that proof of identity must be beyond a reasonable doubt.[12]

Providing the requisite proof may be difficult. The state's task is simplified somewhat by the court's holding in an abbreviated opinion in *State v. Pike*[13] that despite the broad ambit of the attorney-client privilege in criminal cases,[14] defense counsel in the prior case may be required to testify that defendant in the instant proceeding is the same as the person he represented in the prior proceeding. The court said, however, that

> [t]his ruling is not to be construed as suggesting that the state may elicit from the attorney witness over further objection any further information, particularly as relates to the outcome of the previous trial.[15]

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any foreign country, under the seal of his office, if he has a seal, containing the name of the person imprisoned, the photograph, and the finger prints of the person as they appear in the records of his office, a statement of the court in which a conviction was had, the date and time of sentence, length of time imprisoned, and date of discharge from prison or penitentiary, shall be prima facie evidence on the trial of any person for a second and subsequent offense of the imprisonment and of the discharge of the person, either by a pardon or expiration of his sentence as the case may be under the conviction stated and set forth in the certificate."

10. State v. Curtis, 338 So. 2d 662, 664 (La. 1976).

11. 345 So. 2d 23 (La. 1977).

12. Compare the second *Curtis* case wherein the court said that in a general habitual offender proceeding, the showing of identity is to be to the "satisfaction of the trial judge." 338 So. 2d at 664.

13. 343 So. 2d 1388 (La. 1977). Apparently the case was decided on the state's application for writs without benefit of oral argument or full briefing. See the minority views expressed by Justices Dixon and Dennis.

14. *See* State v. Hayes, 324 So. 2d 421 (La. 1975), discussed in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 593 (1977).

15. State v. Pike, 343 So. 2d 1388 (La. 1977).

Whether the rules announced in the foregoing cases will likewise be applied in other instances in which proof of prior convictions may be relevant and admissible will be interesting to observe.

Other Crimes—Balancing Risk of Prejudice Against Probative Value

Even though evidence of another crime is relevant and fits within an exception to the other crimes exclusionary rule recognized by Revised Statutes title 15, sections 445-46,[16] its risk of undue prejudice must be balanced against its probative value, according to *State v. Ledet*.[17] The writers fully agree. Such a view accords with the analysis earlier provided in *State v. Moore*.[18] In the *Ledet* case, the other crime was of an even more egregious character than the charged crime and considering this circumstance the court stated that "the evidence [was] too prejudicial for admission even had it been extremely relevant."[19]

Other Crimes—Knowledge and Intent

Where the defendant is charged with illegal distribution of drugs and there is no real question as to the identity of the defendant as the person who made the alleged distribution, may the prosecution in its *case in chief* introduce evidence of other alleged instances of distribution of the same drug for the purpose of showing guilty knowledge or intent? In the significant decision of *State v. Clark*[20] the court, via an opinion authored

16. LA. R.S. 15:445 (1950):

Inference of Intent; evidence of acts similar to that charged

In order to show intent, evidence is admissible of similar acts, independent of the act charged as a crime in the indictment, for though intent is a question of fact, it need not be proven as a fact, it may be inferred from the circumstances of the transaction.

Id. 15:446:

Evidence where knowledge or intent is material and where offense is one of a system

When knowledge or intent forms an essential part of the inquiry, testimony may be offered of such acts, conduct or declarations of the accused as tend to establish such knowledge or intent and where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent, but not to prove the offense charged.

17. 345 So. 2d 474 (La. 1977).
18. 278 So. 2d 781 (La. 1973).
19. 345 So. 2d at 479 n.2.
20. 338 So. 2d 690 (La. 1976).

by Justice Dixon,[21] holds in the negative, emphasizing that the crime involved is one requiring general intent only.[22] Relying on *State v. Moore*[23] and *State v. Banks*,[24] the court made clear that "the prosecution can not introduce an extraneous offense under the guise of proving 'guilty knowledge' when in fact it is not a genuine matter in issue."[25] The writers agree.

The holding of the court in the *Clark* case seems at variance with the theory adopted in the earlier case of *State v. Strange*.[26] The *Strange* case concerned the admissibility of evidence that at the time a defendant possessed amphetamines he also possessed marijuana to show knowledge or intent as reflecting scienter. A divided court in *Strange*, without extensive discussion, held the evidence admissible. Justice Tate concurred, expressing the view that "[t]he marijuana may have been admissible as part of the res gestae, but not to show scienter."[27] Justice Calogero dissented, apparently concluding that the evidence was inadmissible under any theory.

If the defendant in *Strange*, by cross-examination of the state's witnesses or in his own case in chief, had claimed that he had not knowingly possessed the amphetamines, an argument can be made that the state could very properly have shown the marijuana possession on rebuttal to negative the purported innocent possession. Absent a claim on the part of the defendant that the possession was innocent, the rationale of the *Moore* and *Clark* decisions would seem to indicate that the state may not in its case in chief introduce the other crimes evidence on the supposition that defendant will thereafter claim that possession was unknown or unintended.

Other Crimes—System and Modus Operandi

Despite the narrow definition given to "system" in section 446,[28] the

21. Justices Tate and Calogero signed the plurality opinion written by Justice Dixon. Justice Dennis concurred, "being of the view that the State may use the evidence of the prior offense in rebuttal in a proper case where the defendant has raised issues of intent or identity, which were not present here." 338 So. 2d at 693. Chief Justice Sanders and Justices Summers and Marcus dissented.

22. For cases following *Clark*, *see* State v. Frederick, 340 So. 2d 1353 (La. 1976); State v. Slayton, 338 So. 2d 694 (La. 1976).

23. 278 So. 2d 781 (La. 1973).

24. 307 So. 2d 594 (La. 1975).

25. 338 So. 2d at 693.

26. 334 So. 2d 182 (La. 1976).

27. *Id.* at 186.

28. See note 16, *supra*, for the text of LA. R.S. 15:446 (1950).

courts have interpreted it to include crimes of like modus operandi.[29] When is another crime so closely associated with the charged crime as to constitute part of a "system" within the meaning of the knowledge, intent, system exception to the other crimes exclusionary rule? *State v. Waddles*[30] holds that for the other crime to fit within the "system" exception, the circumstances of the other crime "must be so similar and individual as preponderantly to demonstrate that the perpetrator of both must be identical."[31] This test, said a majority of the court, was not met in *Waddles*.[32]

Character of the Defendant—"Neighborhood" Reputation

Traditionally reputation testimony relevant to the likelihood of the defendant's having committed the charged crime was limited to the reputation the defendant bore in the "neighborhood" in which he resided.[33] Reflecting this tradition, article 479 of the 1928 Code of Criminal Procedure (now section 479 of Revised Statutes title 15) provided that "[c]haracter, whether good or bad, depends upon the general reputation that a man has among his neighbors, not upon what particular persons think of him."[34]

Who are defendant's neighbors for this purpose? For example, can a defendant's longtime fellow employees justifiably be called his "neighbors" in this context when although they know him well at work and the reputation he bears there, they do not reside in his community or residential neighborhood and do not know his community-wide reputation? In *State v. Walker*[35] the court took cognizance of the fact that living patterns have altered and that modern authorities, including Professors Wigmore and McCormick,[36] have hence urged that persons familiar with a defend-

29. *See* State v. Lee, 340 So. 2d 1339, 1344-45 (La. 1976) (Dixon, J., dissenting); State v. Prieur, 277 So. 2d 126 (La. 1973); State v. Spencer, 257 La. 672, 243 So. 2d 793 (1971).

30. 336 So. 2d 810 (La. 1976).

31. *Id.* at 815.

32. A 4-3 majority held that the "other crime" qualified under the "system" exception in *State v. Lee*, 340 So. 2d 1339 (La. 1976), and by a 4-3 vote the court held that the "other crime" did not so qualify in *State v. Gaines*, 340 So. 2d 1294 (La. 1976).

33. *See* C. MCCORMICK, EVIDENCE § 191, at 456 (1972); 5 J. WIGMORE, EVIDENCE § 1615, at 590 (J. Chadbourn rev. ed. 1974).

34. LA. R.S. 15:479 (1950).

35. 334 So. 2d 205 (La. 1976).

36. *See* C. MCCORMICK, EVIDENCE § 191, at 456 (1972); 5 J. WIGMORE, EVIDENCE § 1616, at 591 (J. Chadbourn rev. ed. 1974).

ant's reputation at work be permitted to testify. Achieving the result advocated by these authors, the court in *Walker*, in a very well-reasoned opinion authored by Justice Dixon, wisely holds that "neighbors" in section 479 should be interpreted to include long-standing coworkers. As pertinently quoted in *Walker*, Dean Wigmore stated:

> Time has produced new conditions for reputations. The traditional requirement about "neighborhood" reputation was appropriate to the conditions of the time; but it should not be taken as imposing arbitrary limitations not appropriate in other times. Alia tempora, alii mores.[37]

COMPETENCY OF WITNESSES

Very Young Child as Witness

The test of a witness's competency, by statute in Louisiana,[38] is understanding, not age. The law stipulates, however, that before a child younger than twelve is to be sworn as a witness over objection, the court must be satisfied, after examination, that the child has the requisite understanding.[39] *State v. Noble*,[40] which concerned the alleged rape of a four-year-old child, affords a good example of the application of the rule and the procedure to be followed by the trial court. It held that wide discretion is to be vested in the trial court and that no error was to be found in the trial judge's permitting the alleged victim of the rape, who was five years old at the time of the trial, to testify with respect to the occurrence.

EXAMINATION AND CROSS-EXAMINATION OF WITNESSES

Limiting Examination of Witness to Single Attorney

Article 17 of the Louisiana Code of Criminal Procedure states that a trial court "has the duty to require that criminal proceedings shall be

37. 334 So. 2d at 207.

38. LA. R.S. 15:469 (1950) provides:

> Understanding, and not age, must determine whether any person tendered as a witness shall be sworn; but no child less then twelve years of age shall, over the objection either of the district attorney or of the defendant, be sworn as a witness, until the court is satisfied, after examination, that such child has sufficient understanding to be a witness.

39. For further discussion of the problem *see* 2 J. WIGMORE, EVIDENCE §§ 505-09 (1940); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 448 (1974), reprinted in G. PUGH, LOUISIANA EVIDENCE LAW 23 (Supp. 1976).

40. 342 So. 2d 170 (La. 1977).

conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done." Does this broad authority support a trial judge's ruling that only one lawyer should cross-examine a witness and object to questions put to him by the other side? Rejecting defense counsel's argument that such a ruling was a denial of the effective assistance of counsel, the supreme court in *State v. Unzueta*[41] upheld such a ruling by the trial court. In doing so, the court expressed warm support for such a rule. Although perhaps a sound ground rule generally, it seems to these writers that no such rule should be rigidly applied by a trial court, that in an appropriate setting the same should give way to the overriding goal of full and orderly ascertainment and elucidation of facts and law.[42]

Testing Eyewitness Identification

Eyewitness identification of the defendant as the perpetrator of a crime is, from the standpoint of the defendant, absolutely devastating evidence—possibly the most difficult to meet and refute.[43] Sometimes, of course, the eyewitness may be mistaken. The initial identification may have been a product of suggestion,[44] and the difficulty in "shaking" an initial identification is compounded when it has been reinforced by subsequent events. The fact that at the trial defendant is normally seated next to defense counsel makes the eyewitness's in-court identification especially questionable.[45] How may defense counsel anticipating a questionable identification protect his client? Where no lineup has been held, does the defendant have the right to a pre-trial lineup? Even if the defendant has no "right" to same, may the trial court in its discretion, on the request of the

41. 337 So. 2d 1102 (La. 1976).

42. *See* 3 J. WIGMORE, EVIDENCE § 783 (1940).

43. For discussions of the problem, *see The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 312 (1973), reprinted in G. PUGH, *supra* note 39, at 382; *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 31 LA. L. REV. 381, 390 (1971), reprinted in G. PUGH, *supra* note 39, at 383; *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Evidence*, 30 LA. L. REV. 321, 333 (1970), reprinted in G. PUGH, *supra* note 39, at 385; *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Pretrial Criminal Procedure*, 35 LA. L. REV. 461, 480 (1975), reprinted in G. PUGH, *supra* note 39, at 176 (Supp. 1976); *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Criminal Procedure I*, 34 LA. L. REV. 396, 414 (1974), reprinted in G. PUGH, *supra* note 39, at 179 (Supp. 1976).

44. *See* Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); and their progeny.

45. *See* discussion in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 592 (1977).

defendant, order such a lineup? If such a lineup is to be held, can the defendant succeed in efforts to secure the presence of another suspect? The problems are manifold.

In an erudite opinion authored by Justice Tate, the majority of the court in *State v. Boettcher*[46] (a murder case) held that although a defendant has no constitutional or legal right to insist on a pre-trial lineup, "a district court has broad discretion to order one or not, in the interests of the fairness of the identification of the defendant, upon proper showing of an exceptional nature that otherwise the trial testimony as to his visual identification (if a material issue) may not be reliable."[47] The court went on to say that the trial court also "has broad discretion to order protective measures other than a pretrial lineup, such as by seating the defendant elsewhere than in the normal place of an accused in the courtroom."[48] It appears, however, from *Boettcher* that where the trial court has refused to grant defendant's request for a pre-trial lineup, the supreme court will be very reluctant to upset a conviction *on appeal*—that to protect his client's interest in the event of a trial court denial of such a request, defense counsel had best seek redress by pre-trial writ of review.

A companion case to *Boettcher* is *State v. Jackson*.[49] The defendant in *Jackson* sought to have another individual placed in a lineup with him, maintaining that the police had received "hard information" that the other had committed the crime. The supreme court, on application for writ of review, remanded the case to the trial court for it to exercise its discretion as to whether to grant the requested lineup. In a perceptive concurring opinion by Justice Dennis, it was recognized that whether the other suspect should be so included involves serious problems concerning the latter's interest in not being forced to participate in such a lineup.[50]

Rebuttal and Surrebuttal—"Saving" Evidence

The impropriety of the state's "saving" part of its case for introduc-

46. 338 So. 2d 1356 (La. 1976).

47. *Id.* at 1361.

48. *Id. See* State v. Madison, 345 So. 2d 485 (La. 1977); State v. Johnson, 343 So. 2d 155 (La. 1977); State v. Williams, 341 So. 2d 370 (La. 1976).

49. 338 So. 2d 1363 (La. 1976).

50. *See* Davis v. Mississippi, 394 U.S. 721 (1969); United States v. Holland, 552 F.2d 667 (5th Cir. 1977). Relevant to such an inquiry is *State v. Bell*, 334 So. 2d 385 (La. 1976), concerning the interest of a person on bail not to be forced to participate in a lineup.

tion on rebuttal is now clearly established in Louisiana.[51] *State v. Turner*[52] is clear and persuasive authority on the point. It affords an excellent discussion of all aspects of the problem and demonstrates why, in tandem with another matter,[53] the practice provided the basis for reversal. In broad language the court stated:

> The state may not reserve part of its case-in-chief for rebuttal testimony, after the defense has put on its case and when it can no longer present evidence to rebut the state's case. This is contrary to statute, to ancient jurisprudence, and to rules of fair play.[54]

The court recognized, however, that as stated in Marr's Criminal Jurisprudence,

> this rule cannot always be enforced with cast-iron inflexibility, and must yield in its application to the sound discretion of the trial judge, whose ruling will not be disturbed except in extreme cases, as where the evidence has been kept back deliberately and for the purpose of deceiving and obtaining an undue advantage of defendant.[55]

Credibility Attack and the Right of Confrontation

State v. Bolton[56] makes clear that a defendant in a criminal case has a constitutional right to cross-examine about pertinent prior inconsistent statements made by witnesses for the prosecution. In a very well-written opinion[57] Justice Calogero, citing *Davis v. Alaska*,[58] stated:

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51. For a discussion of prior cases bearing on the subject, *see The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 661 (1976).

52. 337 So. 2d 455 (La. 1976).

53. Another basis for reversal concerned the failure of the state to give notice to the defendant of an incriminating statement which was introduced by the state in rebuttal, in contravention, the court found, of the anti-"saving" rule. For a discussion of this aspect of the case, see text at notes 123-25, *infra*.

54. 337 So. 2d at 458 (citations omitted).

55. 2 MARR'S CRIMINAL JURISPRUDENCE OF LOUISIANA § 633, at 967 (1923) (footnotes omitted), *quoted in* State v. Turner, 337 So. 2d 455, 459 (La. 1976). The court, quoting the above language, found in the later case of *State v. Watkins*, 340 So. 2d 235, 239 (La. 1976), that under the circumstances there presented, the evidence offered in rebuttal was "timely rather than belatedly presented."

56. 337 So. 2d 446 (La. 1976).

57. This part of Justice Calogero's opinion achieved majority support. Finding it unnecessary to take a position on other matters discussed in the plurality opinion, Justice Dennis concurred in this part of the opinion only. Chief Justice Sanders and Justices Summers and Marcus dissented.

58. 415 U.S. 308 (1974). For further discussion of the right of confrontation and

> Whatever the merit of the court's ruling that the report should not be produced, it can hardly be denied that it was error to gag counsel in cross-examination by preventing an effort to impeach the witness by using information which he had fortuitously acquired prior to trial.
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> . . . .
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> The simple fact is that defendant's constitutional right to confrontation by appropriate cross-examination was improperly curtailed in a material and substantial way.[59]

ATTACKING CREDIBILITY OF WITNESSES

Prior Inconsistent Statement—Attempt to Minimize Impact

Where defense counsel in a criminal case knows of a damaging prior inconsistent statement by one of his witnesses, may he forestall prosecutorial inquiry into same by questioning the witness on direct with respect thereto, eliciting the fact of the prior statement and that it was "entirely different" from his testimony on the stand? The court in *State v. Redwine*[60] properly found such a defense maneuver inefficacious, holding that despite such a defense tactic the prosecution is entitled on cross-examination to make the usual specific inquiry of the witness regarding time, place and circumstances of the out-of-court inconsistent statement.[61] Further, if in response to such a question the witness denies the statement, the same is admissible to impeach.

Bias, Interest, Corruption—Ambit of Attack

In *State v. Cappo*[62] the state's star witness testified that the defendant had conspired with him to burglarize a residence, and admitted that he (the witness) was testifying on behalf of the state in accordance with a "deal." The defense claimed that the witness's implication of the defendant, an innocent party, was part of a cleverly designed scheme to minimize the witness's sentence and that the same was in keeping with the witness's

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defendant's right to attack the credibility of prosecution witnesses, *see The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 586 (1977); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 538 (1975), reprinted in G. PUGH, *supra* note 39, at 33 (Supp. 1976).

59. 337 So. 2d 446, 450 (La. 1976).

60. 337 So. 2d 1041 (La. 1976).

61. LA. R.S. 15:493 (1950).

62. 345 So. 2d 443 (La. 1977).

similar conduct upon other occasions. Reversing the conviction, the court held that the trial court erred in not permitting the defendant to show such prior similar conduct. The case demonstrates the wide berth the court apparently feels should be accorded to a bias, interest, corruption attack upon the credibility of a state's witness,[63] a right which is now recognized to be of federal constitutional dimensions.[64]

Bias, Interest, Corruption—Prior Arrest When Relevant to Show Bias and Interest

In an excellent opinion in *State v. Robinson*,[65] Justice Tate, speaking for a unanimous court, makes it very clear that if a witness's prior arrest has a particularized relevance to show motive for falsification because of bias or interest, the same may be inquired into, despite the provisions of section 495 of Revised Statutes title 15.[66] The writers fully agree.

IMPEACHMENT

Bias, Interest, Corruption—Extrinsic Showing of "Collateral" Matter

Revised Statutes title 15, section 494, provides that "[i]t is not competent to impeach a witness as to collateral facts or irrelevant matter."[67] Was it the intent of this provision to preclude an extrinsic showing of a witness's bias, interest, or corruption by collateral matter? For reasons advanced by these writers in a prior issue of this Review,[68] we feel that it was not—that instead, it was designed as a general limitation upon an extrinsic showing of a prior inconsistent statement.[69] Under the sug-

63. *See* State v. Nolan, 341 So. 2d 885 (La. 1977).

64. *See* Davis v. Alaska, 415 U.S. 308 (1974); *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 586 (1977). *See also* State v. Bolton, 337 So. 2d 446 (La. 1976) (relying in part on *Davis v. Alaska*, reversed a conviction because of improper limitation on defendant's right of cross-examination).

65. 337 So. 2d 1168 (La. 1976).

66. LA. R.S. 15:495 (Supp. 1952) provides in part, "Evidence of conviction of crime, but not of arrest, indictment or prosecution, is admissible for the purpose of impeaching the credibility of the witness." *See The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 586 (1977); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 538 (1975), reprinted in G. PUGH, *supra* note 39, at 33 (Supp. 1976); Comment, *Admissibility of Evidence of Prior Arrests in Louisiana Criminal Trials*, 19 LA. L. REV. 684 (1959), reprinted in G. PUGH, *supra* note 39, at 53.

67. LA. R.S. 15:494 (1950).

68. *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 586 (1977).

69. LA. R.S. 15:493 (1950).

gested view, extrinsic matter introduced to show the bias, interest, or corruption of a witness may be admissible even though it involves side issues.

The court in the recent case of *State v. Cappo*[70] reached the same end result as that advocated by the writers, but by a different route. It concluded that showing the bias, interest, or corruption of a witness is not a collateral matter even though it involves going into circumstances that otherwise would be unrelated. Because of its importance to the case, what would otherwise be a side issue becomes non-collateral, reasons the court. The writers agree that the "collateral" label should not be used to bar extrinsic matter appropriately relevant to show bias, interest, or corruption. However, since matters thus inquired into may be relevant only for impeachment purposes and may involve an inquiry into side issues, it is submitted that their character as collateral matter should not be considered altered simply because they are deemed admissible.[71]

Convictions—Details of the Crime

In two cases[72] decided during the past term, the court continued to apply the rule announced in *State v. Jackson*[73] in 1975, that a witness on cross-examination who has admitted having been convicted of a crime may be asked about details thereof to show "the true nature of the offense." This position is an unorthodox, extreme minority view. For the reasons set forth earlier,[74] the writers feel that the approach taken in *Jackson* is unfortunate. The matter is the subject of critical comment in a student topic note shortly to appear in this Review.

CORROBORATION OF WITNESSES

Proof of Prior Identification by Witness

One usually may not corroborate a witness until the witness "has been impeached or contradicted, or his character or credibility assailed."[75]

70. 345 So. 2d 443 (La. 1977).

71. *But see* 3A J. WIGMORE, EVIDENCE § 1003 (J. Chadbourn rev. ed. 1970) (cited and relied upon by the court).

72. State v. Jackson, 339 So. 2d 730 (La. 1976); State v. Williams, 339 So. 2d 728 (La. 1976).

73. 307 So. 2d 604 (La. 1975), discussed in *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 662 (1976).

74. *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 662 (1976).

75. LA. R.S. 15:485 (1950). Because of the inherent untrustworthiness of an

Louisiana law also provides that generally if a witness's testimony has been "assailed," prior consistent statements made at an unsuspicious time are admissible to corroborate the witness.[76] Presumably, assertive conduct is in this context to be treated as a "statement."[77]

Is there a condition prerequisite to the state's showing that a witness who on the stand identifies the defendant as the perpetrator of the crime had previously made an out-of-court identification? *State v. Ford*[78] alludes to the problem in a footnote[79] and takes the position that unless the credibility of the state's witness has been attacked, the corroborating out-of-court identification is inadmissible.[80] This seems clearly to be within the spirit of the statutory rules.

Supporting Credibility Prior to Attack

Section 484 of Revised Statutes title 15 sets forth the general rule that a witness's credibility cannot properly be supported before it is attacked.[81] Section 485 notes, however, that "the testimony of an accomplice may be corroborated even before it is attacked."[82] *State v. Passman*[83] is an interesting case concerning the rule.

Although Louisiana statutes do not enumerate lack of capacity as a means of attacking the credibility of a witness, it is a method generally recognized elsewhere in the country and was approved by the Louisiana

alleged accomplice turned state's witness, LA. R.S. 15:485 (1950) provides that an accomplice's testimony may be corroborated even absent an attack.

76. LA. R.S. 15:496 (1950). LA. R.S. 15:497 (1950), however, provides:

> Evidence of former consistent statements is inadmissible to sustain a witness who has been impeached by proof of former inconsistent statements, unless his testimony be charged to have been given under the influence of some improper or interested motive, or to be a recent fabrication, in which case, in order to repel such imputation, it is proper to show that the witness made a similar statement at a time when the supposed motive did not exist and the effect of such statement could not be foreseen. But when a witness has been impeached by evidence of declarations inconsistent with his testimony, he can not be corroborated by statements made subsequent to such declarations.

77. *See* FED. R. EVID. 801(a)(2); State v. Ford, 336 So. 2d 817 (La. 1976).

78. 336 So. 2d 817 (La. 1976).

79. *Id.* at 822 n.2.

80. See also the authorities relied on by the court: State v. Watson, 159 La. 779, 106 So. 302 (1925); State v. Waggoner, 39 La. Ann. 919, 3 So. 119 (1887). On whether such a prior identification is hearsay, see the discussion of *State v. Ford* in the text at notes 98-107, *infra*.

81. LA. R.S. 15:484 (1950).

82. *Id.* 15:485 (1950).

83. 345 So. 2d 874 (La. 1977).

Supreme Court in 1976 in *State v. Luckett*.[84] In *Passman* the prosecution called the 80-year-old victim of an armed robbery, and in an effort to demonstrate that the witness's vision was good, was permitted on direct examination, over objection, to attempt to show that he was a hunter and had recently killed game. Rejecting the state's argument that it had a right to support the visual acuity of such an elderly witness even before attack, the supreme court, citing section 484, upheld defense counsel's contention that the trial court's ruling was erroneous. It found, however, that defendant had not shown prejudice and concluded that under the circumstances presented, the trial court ruling was non-reversible error.

It would seem very difficult for a defendant to show actual prejudice because of a violation of section 484, for it is difficult to demonstrate what impact the corroborating testimony may have had on the minds of the jury. Rather than to say that the action of the trial court was non-reversible error, it would have been preferable, the writers submit, for the court to hold that the witness's advanced age naturally raised questions about his visual acuity, and that in light of such circumstances it was not inappropriate for the trial court *in its discretion* to admit the supportive testimony. The rule permitting impeachment of testimony by a showing of lack of capacity is a non-statutory, judge-made rule and it seems appropriate for the court to regulate it by judge-made exceptions rather than by application of an ill-fitting statute. The visual acuity of an octogenarian is inherently subject to question, as is the credibility of an accomplice called by the state. The factors giving rise to the statutory exception concerning an accomplice support a similar exception here.

PRIVILEGE

State Recognition of Privilege or "Testimonial Incompetency" as Denial of a Defendant's Rights of Confrontation and Compulsory Process

It is clear from *Davis v. Alaska*[85] that under certain circumstances recognition of a testimonial privilege which has the effect of blocking a criminal defendant's adducing relevant evidence may be an unconstitutional denial of a defendant's right of confrontation.[86] An analogous

84. 327 So. 2d 365 (La. 1976), discussed in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 585 (1977).

85. 415 U.S. 308 (1974), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 538 (1975), reprinted in G. PUGH, *supra* note 39, at 33 (Supp. 1976).

86. *See* State v. Babin, 319 So. 2d 367, 372 (La. 1975) (Tate, J., concurring). *See also* State v. Carney, 334 So. 2d 415 (La. 1976). For further discussion, *see* Note, 73 MICH. L. REV. 1465 (1974).

problem is presented where, instead of being phrased in terms of privilege, a statute declares certain evidence to be "incompetent." In light of *Washington v. Texas*,[87] a state's putting certain matters in a sanctuary area or "incompetency" category may violate a defendant's right of compulsory process.

State v. Durr[88] is an intriguing case bearing on the problem. Following defendant's conviction of second degree murder, defense counsel adduced testimony tending to substantiate his claim that during the trial the foreman of the jury had, out of the presence of the defendant and other jurors, conducted a simulated reenactment of the crime and had reported the results to his fellow jurors. Defendant contended that in so doing, the foreman became a "witness" giving evidence to the jury in violation of defendant's right of confrontation. To establish the alleged misconduct, defense counsel, in addition to adducing the testimony of a non-juror, sought to question the jury foreman. Relying on section 470 of Revised Statutes title 15, which states that a juror is incompetent to testify to his own misconduct,[89] the court, in a 4-3 decision, upheld the action of the trial court in refusing to permit this line of questioning of the juror.[90] Justice Tate in dissent took the position that Code of Criminal Procedure article 762(2) and the official comment thereto recognize the defendant's right to be present at any simulated enactment of the alleged crime, and that violation of this right would be a violation of his constitutional right to confrontation. Justice Tate concluded that the juror incompetency provision should not be used to prevent defendant's showing a violation of such valued constitutional rights. Further, it is submitted that to permit section 470 to bar defendant from establishing a denial of confrontation may well have violated his right of compulsory process.

Reporter's Privilege

Dumez v. Houma Municipal Fire and Police Civil Service Board[91] is the first appellate case in Louisiana concerning the conditional reporter's privilege created in 1964 by the Louisiana Legislature.[92] The court said

87. 388 U.S. 14 (1967). *See* Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974); Westen, *Compulsory Process II*, 74 MICH. L. REV. 191 (1975).

88. 343 So. 2d 1004 (La. 1977).

89. LA. R.S. 15:470 (1950).

90. For other cases decided during the past term concerning the juror incompetency rule, *see* State v. Sullivan, 333 So. 2d 638 (La. 1976); State v. Johanson, 332 So. 2d 270 (La. 1976).

91. 341 So. 2d 1206 (La. App. 1st Cir. 1977).

92. LA. R.S. 45:1451-1454 (Supp. 1964).

that unlike statutes in some other states, the Louisiana conditional privilege extends only to identity of informant and source of information, not to the information itself. Here the court found that the reporter had revealed the substance of the information. Finding that the party seeking to compel disclosure of the source of information had not carried the statutory burden of showing that the same was "essential to the protection of the public interest,"[93] the court upheld the privilege.

Police Records Privilege

Louisiana's Public Records Act[94] provides that it shall not be interpreted to authorize access to

> [r]ecords pertaining to pending criminal litigation or any criminal litigation which can be reasonably anticipated, until such litigation has been finally adjudicated or otherwise settled.[95]

The statute goes on to provide that "[w]henever the same is necessary" judicial determinations of access shall be made after a "contradictory hearing."[96]

Conella v. Johnson[97] is an interesting case concerning whether under particular circumstances a civil litigant has a right to examine public officials concerning facts surrounding pertinent criminal proceedings, and force production of documents relative to same. The supreme court, speaking through Justice Marcus, held that in the hearing to determine applicant's right to such information, applicants were entitled to question public officials in order to show that the information sought was unrelated to pending or reasonably anticipated litigation. Further, the court held that testimony by the district attorney and assistant district attorney that newly filed charges had reactivated investigation incidental to an earlier nolle prossed charge was insufficient to cut off the right to the contradictory hearing provided by the statute. The case appears eminently sound.

HEARSAY

Non-verbal Assertive Conduct

The hearsay rule strikes at out-of-court assertions not under oath or subject to cross-examination offered in court to prove the truth of the out-

93. *Id.* 45:1453 (Supp. 1964).
94. *Id.* 44:1 *et seq.* (Supp. 1973).
95. *Id.* 44:3(A)(1) (Supp. 1972).
96. *Id.* 44:3(C) (Supp. 1972).
97. 345 So. 2d 498 (La. 1977).

of-court assertion.[98] Whether the out-of-court conduct was verbal or non-verbal should make no difference.[99] The 1973 case of *State v. St. Amand*[100] had taken a contrary position and very properly was disapproved in *State v. Ford*.[101] Thus, if a person out of court points out another person in a lineup with the intent of asserting that that person is the perpetrator of a crime, or with similar intent picks out a photograph, testimony describing such conduct is to be treated just as though the out-of-court identification had been verbal rather than non-verbal. The court held in *Ford*, however, that under the circumstances there presented the admission of the testimony regarding the out-of-court identification was at most non-reversible error.[102] The victim had positively identified the defendant in testimony given at the preliminary examination. The victim had thereafter died (of unrelated causes) and his preliminary examination testimony was admitted in evidence at the trial. The supreme court held that the out-of-court identifications by the victim were merely cumulative and corroborative. *Inter alia*, via extensive discussion of developments elsewhere in the country in this area, the court seemed to indicate its own receptivity to the admissibility of such evidence under appropriate circumstances.

As recognized by the court in a footnote in *Ford*, according to Louisiana law if the testimony of an identifying witness on the stand has been assailed, testimony concerning prior out-of-court identifications by him at an unsuspicious time are clearly admissible corroborative evidence to support the in-court identification. For such evidence to come in under

98. *See* FED. R. EVID. 801; C. MCCORMICK, EVIDENCE §§ 244 *et seq.* (1972); 5 J. WIGMORE, EVIDENCE §§ 1360 *et seq.* (J. Chadbourn rev. ed. 1974); Comment, *Hearsay and Non-Hearsay as Reflected in Louisiana Criminal Cases*, 14 LA. L. REV. 611 (1954), reprinted in G. PUGH, *supra* note 39, at 412.

99. *See The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 455 (1974), reprinted in G. PUGH, *supra* note 39, at 202 (Supp. 1976), and authorities therein cited.

100. 274 So. 2d 179 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Evidence*, 34 LA. L. REV. 443, 455 (1974), reprinted in G. PUGH, *supra* note 39, at 202 (Supp. 1976), and authorities therein cited.

101. 336 So. 2d 817 (La. 1976). The court also disapproved of language in *State v. Wilkerson*, 261 La. 342, 259 So. 2d 871 (1972), discussed in *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 315 (1973), reprinted in G. PUGH, *supra* note 39, at 429, indicating such conduct to be non-hearsay. *See also* State v. Jacobs, 344 So. 2d 659 (La. 1976) (following *Ford*).

102. To similar effect, *see* State v. Williams, 343 So. 2d 1026 (La. 1977); State v. May, 339 So. 2d 764 (La. 1976).

this rule,[103] however, the testimony of the identifying witness must have been "assailed."[104] In the opinion of these writers, requiring such an attack upon the testimony of the identifying witness is perhaps not an undue limitation upon the admissibility of the out-of-court assertive conduct.[105] The problem is fraught with difficulty and it is not easy to lay down a rule which will be satisfying in all cases.

Following *Ford*, in *State v. Jacobs*[106] the majority of the court held that when the victim of a crime is a witness in court and fails to give a positive identification of the defendant, testimony concerning an out-of-court identification by him is not only inadmissible hearsay, but its admission in evidence constitutes reversible error. The writers agree.[107]

State of Mind of Victim

State v. Weedon[108] decided during the past year is a case of great significance. It involves a factual context of intriguing dramatic character similar to that of other landmark cases in this area—*Mutual Life Insurance Co. v. Hillmon*,[109] *Shepard v. United States*,[110] *People v. Alcalde*,[111] and *State v. Raymond*.[112] Like those cases, *Ford* tackles the problem of when, if at all, an out-of-court statement of an individual is admissible as tending to show the actions of another.[113]

The defendant in *Weedon* had been charged with murdering his wife and putting her body in the trunk of his car. Over pertinent objection, the trial court had permitted the state to introduce testimony by three witnesses that the dead wife had told them that she intended to leave her husband. The theory of the state was that the evidence was relevant to show motive. The statements to two of the witnesses were found to be unduly remote.[114]

103. LA. R.S. 15:496, 497 (1950).

104. See discussion in text at notes 75-84, *supra*.

105. *But see* FED. R. EVID. 801.

106. 344 So. 2d 659 (La. 1976).

107. In *Jacobs* the victim on the witness stand said only that the defendant " 'looked very much like' the perpetrator." 344 So. 2d at 660.

108. 342 So. 2d 642 (La. 1977).

109. 145 U.S. 285 (1892).

110. 290 U.S. 96 (1933).

111. 24 Cal. 2d 177, 148 P.2d 627 (1944).

112. 258 La. 1, 245 So. 2d 335 (1971).

113. The dissenting justices in *Weedon* found it unnecessary to discuss the hearsay issue.

114. The statements supposedly were made to the witnesses some three and five weeks prior to the time of the wife's death and prior to the time that the wife had taken a trip to California with her husband and returned to Louisiana with him.

The statement to the third witness was much closer in time—a statement by the wife the day before her death that she planned *secretly* to leave her husband the next morning. The statement was inadmissible to show that she carried out her intention, reasons the court, since if the wife had succeeded in carrying out her intent, defendant would not have known of her departure. If the alleged intent had been carried out, the supposed motive would have been absent. Further, said the court, the statement was inadmissible to show the state of mind of the wife *apart* from the husband's motive. In this connection the court found that

> [s]ince the hearsay was far more probative of [the husband's] motive, prohibited by our jurisprudence, than of the wife's state of mind (assuming the latter, uncommunicated to her husband, to be relevant, cf. 32 La.L.Rev. 355), its prejudicial effect far outweighed its probative value as to the wife's state of mind or intention.[115]

The *Raymond* case, which had appeared to give an overly broad range to the state of mind exception,[116] happily seems to be severely limited by the *Weedon* decision.

Admissions—Silence of a Defendant in Custody After Arrest

Two cases[117] decided during the past term concern the admissibility of evidence of the silence of a defendant in custody after arrest.[118] If the prosecution at trial inquires about such silence or comments thereon before the jury, is defendant entitled to a mistrial? A divided court held in *State v. Smith*[119] that prosecutorial references to the defendant's silence after arrest are not embraced within the language of Code of Criminal Procedure article 770[120] regarding the consequences of reference to nontestimony of

115. 342 So. 2d at 647. *See* Shepard v. United States, 290 U.S. 96, 104 (1933).

116. *See The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Evidence*, 32 LA. L. REV. 344, 352 (1972), reprinted in G. PUGH, *supra* note 39, at 425.

117. State v. Montoya, 340 So. 2d 557 (La. 1976); State v. Smith, 336 So. 2d 867 (La. 1976).

118. *See The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Evidence*, 26 LA. L. REV. 606, 618 (1966), reprinted in G. PUGH, *supra* note 39, at 327; Note, 24 LA. L. REV. 115 (1963), reprinted in G. PUGH, *supra* note 39, at 323. *See also* Doyle v. Ohio, 426 U.S. 610 (1976).

119. 336 So. 2d 867 (La. 1976).

120. LA. CODE CRIM. P. art. 770 provides: "Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to: . . . (3) The failure of the defendant to testify in his own defense."

a defendant at trial, and therefore do not *necessarily* entitle a defendant to a mistrial. Although this interpretation of article 770 appears technically sound, it seems that practically any mention of the fact that the defendant kept silent after arrest should necessitate granting a motion for mistrial under Code of Criminal Procedure article 771.[121] Under this view, even so slight an incursion upon the rule as encountered in *State v. Smith* should suffice for mistrial. Because of the peculiar circumstances presented in *Smith*, however, the majority concluded that an admonition to disregard afforded the defendant sufficient protection.

In *State v. Montoya*,[122] the trial court had failed to sustain defendant's objection to a prosecutorial question relative to defendant's non-explanation of his actions to the police after his arrest. No effort was made by the trial court to minimize the damage, and the decision of the supreme court reversing the conviction appears clearly correct.

Confessions—Necessity of Article 768 Notice for Statements Offered on Rebuttal

In an excellent opinion in *State v. Sneed*,[123] Justice Tate etched out the reasons underlying the statutory requirement for pre-trial notice to the defendant of the state's intention to introduce a confession or inculpatory statement. In the later case of *State v. Turner*,[124] the court held that the notice requirement was applicable to an inculpatory statement offered by the state on rebuttal.[125]

121. LA. CODE CRIM. P. art. 771 provides:

In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury: (1) When the remark or comment is made by the judge, the district attorney, or a court official, and the remark is not within the scope of Article 770; or (2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770. In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a fair trial.

122. 340 So. 2d 557 (La. 1976).

123. 316 So. 2d 372 (La. 1975).

124. 337 So. 2d 455 (La. 1976).

125. It found, however, that in the context of the case the statement in fact was not proper rebuttal evidence.

Confessions—Defense Evidence on the Issue of Voluntariness

Louisiana law provides that before a confession may be introduced in evidence it must be affirmatively shown that it was freely and voluntarily made.[126] Defendant has a right to have a hearing on this matter outside the presence of the jury,[127] and it has long been held that at the hearing defendant is entitled to testify on the voluntariness issue without exposing himself to cross-examination on the entire case.[128] Such a holding is a limitation upon the general Louisiana rule that a witness who takes the stand may be cross-examined as to all relevant matter,[129] and that a defendant who takes the stand is governed by the rules applicable to the ordinary witness and may be cross-examined as to the entire case.[130] If the trial judge decides that the confession is admissible, the state nonetheless is obligated again to introduce evidence on the voluntariness issue before the jury so that the jury may weigh the confession in light of the evidence regarding voluntariness.[131]

Defendants, of course, generally want to controvert such state evidence and often would prefer to do it contemporaneously with the introduction of the state's predicate and prior to the jury's hearing the confession, rather than to delay the introduction of their evidence of nonvoluntariness until the defendant's case in chief. Whether a defendant has the right to make such a contemporaneous attack on the voluntariness of the confession was adverted to by the court, but unanswered, in *State v. Whatley*.[132] It was again considered in *State v. Carson*[133] and *State v. Lovett*.[134] The matter, for the time being at least, has been left to the discretion of the trial court, without any hard and fast rules. The supreme court appears to feel, however, that the preferable approach is for the trial court to permit such defense evidence to be adduced prior to the reception of the confession itself.

126. LA. R.S. 15:451 (1950). The same rule applies to admissions involving criminal intent. LA. R.S. 15:454 (1950).

127. *See* LA. CODE CRIM. P. art. 794, comment b. *See also* Jackson v. Denno, 378 U.S. 368 (1964).

128. *See* State v. Thomas, 208 La. 548, 23 So. 2d 212 (1945); State v. Lanthier, 201 La. 844, 10 So. 2d 638 (1942).

129. LA. R.S. 15:280 (Supp. 1967).

130. *Id.* 15:462 (1950).

131. *See* Comment, *Confessions in Louisiana Law*, 14 LA. L. REV. 642 (1954), reprinted in G. PUGH, *supra* note 38, at 279. *See also* LA. CODE CRIM. P. art. 703(B).

132. 320 So. 2d 123 (La. 1975).

133. 336 So. 2d 844 (La. 1976).

134. 345 So. 2d 1139 (La. 1977).

State v. Lovett also faced the far more significant question of whether defendant, contemporaneously with the introduction of the state's evidence on the voluntariness issue, should be afforded the right to testify before the jury on the limited issue of voluntariness, without subjecting himself to cross-examination on issues other than voluntariness and matters relative to credibility. The problem split the court. The majority, speaking through Justice Tate, reasoned that the issue is essentially one of trying to protect defendant's interest in presenting evidence (especially his own testimony) for use by the jury in weighing the confession, as well as his interest in preserving his privilege against self-incrimination. Instead of resting its opinion on constitutional considerations, the court based its decision on an interpretation of statutes it found consonant with "greater procedural efficiency and fairness."[135] It concluded that the defendant should be permitted to give such limited testimony and overruled conflicting cases prospectively. The dissenters argued vigorously that the rule announced by the majority is in derogation of the Louisiana statutory scheme and its traditional "broad rule" of cross-examination, and that permitting defendant to limit his testimony at the judicial hearing on admissibility is a sufficient safeguard.

Co-Defendant's Confession Implicating Defendant

Relying in part upon *State v. Hopper*,[136] the majority of the court in *State v. McSpaddin*[137] takes the position that the *Bruton*[138] rule does not necessitate a mistrial where a non-testifying co-defendant's confession implicating both co-defendant and defendant is introduced in evidence and such confession interlocks with a similar confession by defendant implicating the co-defendant. Although there is considerable authority to

135. *Id.* at 1143.

136. 253 La. 439, 218 So. 2d 551 (1969), discussed in *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Evidence*, 30 LA. L. REV. 321, 330 (1970), reprinted in G. PUGH, *supra* note 39, at 656. *See also* Comment, *Harmless Constitutional Error—A Louisiana Dilemma?*, 33 LA. L. REV. 82 (1972), reprinted in G. PUGH, *supra* note 39, at 550.

137. 341 So. 2d 868 (La. 1977).

138. Bruton v. United States, 391 U.S. 123 (1968), discussed in Comment, *Hearsay, The Confrontation Guarantee and Related Problems*, 30 LA. L. REV. 651 (1970), reprinted in G. PUGH, *supra* note 39, at 388. *See also The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 31 LA. L. REV. 381, 389 (1971), reprinted in G. PUGH, *supra* note 39, at 411; *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Evidence*, 30 LA. L. REV. 321, 330 (1970), reprinted in G. PUGH, *supra* note 39, at 656.

support the view taken by the court, the writers share the concern expressed by a panel of the United States Court of Appeals for the Second Circuit in *United States ex rel. Ortiz v. Fritz*.[139] Despite the time and expense necessarily involved in separate trials in such cases, it seems to us that it is a price that should be paid to protect a defendant's valued right of confrontation.

Excited Utterance—Necessity for Declarant to Have Had First-Hand Knowledge

For an excited utterance to be admissible as an exception to the hearsay rule, must there be evidence sufficient to support an inference that the declarant himself actually witnessed the exciting event? Citing case law in other jurisdictions[140] and persuasive commentary,[141] the court in *State v. Bean*,[142] in a well-reasoned opinion authored by Chief Justice Sanders, holds in the affirmative.[143] There was indication, however, that the first-hand knowledge requirement might perhaps be satisfied not only by evidence independent of the statement, but by affirmations in the proffered statement itself.

The *Bean* case is an interesting one. The state's witness had come upon the victim of a homicide, noted the knife wound in the stomach, and contemporaneously was told by the declarant (who was apparently holding the victim in his arms) that the defendant had stabbed the victim. The supreme court, finding that there was insufficient evidence "to support a reasonable inference" that declarant had first-hand knowledge of that of which he spoke and noting that the case against the defendant was circumstantial in character, concluded that the admission of the testimony by the trial court was reversible error.

139. 476 F.2d 37 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973).

140. Carney v. Pennsylvania R.R., 428 Pa. 489, 240 A.2d 71 (1968); Montesi v. State, 220 Tenn. 354, 417 S.W.2d 554 (1967).

141. C. MCCORMICK, EVIDENCE § 297, at 705 (2d ed. 1972); 6 J. WIGMORE, EVIDENCE § 1751, at 155 (3d ed. 1940); Comment, *Excited Utterances and Present Sense Impressions as Exceptions to the Hearsay Rule in Louisiana*, 29 LA. L. REV. 661, 673 (1969), reprinted in G. PUGH, *supra* note 39, at 494; 29 AM. JUR. 2D EVIDENCE § 724 at 795 (1967).

142. 337 So. 2d 496 (La. 1976).

143. The test laid down in the instant case appears somewhat more rigorous than that formulated by Professor McCormick from his study of the case law: In a modified manner the requirement that a witness have had an opportunity to observe that to which he testifies is applied. Direct proof of firsthand knowledge is not necessary; if the circumstances appear consistent with opportunity by the declarant, this is sufficient. C. MCCORMICK, EVIDENCE § 297 at 707 (2d ed. 1972) (footnotes omitted).

Reported Testimony

When is a witness "unavailable" within the meaning of the unavailability requirement for the admissibility of reported testimony? Feeling constrained to follow earlier jurisprudence[144] about which he continued to express misgivings, Justice Calogero, writing for a unanimous court in *State v. Pearson*,[145] held that a witness is to be deemed "unavailable" for this purpose even though he is actually in court, when despite appropriate efforts his testimony cannot be secured. The court notes that although the witness was not in fact held in contempt for refusal to answer, contempt proceedings would have been useless since the witness was already serving a 20-year sentence in a federal penitentiary.

Business Records in Criminal Cases—Right of Confrontation

To what extent are business records admissible against a defendant in a criminal case under an exception to the hearsay rule? Despite inherent problems concerning a defendant's constitutional right of confrontation, previous decisions by the supreme court appeared to take a fairly broad view of admissibility under such an exception.[146]

In the landmark case of *State v. Monroe*[147] this past term, authored by Justice Dennis, the court takes a much narrower, more conservative view. In a scholarly opinion reviewing case law in Louisiana and law review commentary, the court concluded that at times the Louisiana court had been insufficiently protective of the rights of a defendant in this area and held that

> [b]efore the exception may be invoked by the State against the defendant, allowing introduction of a permanent record made in the ordinary course of business from personal knowledge of the facts recorded, or from information furnished by one having a business duty to observe and report the facts, it must be shown that the person

144. State v. Ghoram, 328 So. 2d 91 (La. 1976); State v. Dotch, 298 So. 2d 742 (La. 1974).

145. 336 So. 2d 833 (La. 1976).

146. *See The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 671 (1976); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 547 (1975), reprinted in G. PUGH, *supra* note 39, at 207 (Supp. 1976); *The Work of the Louisiana Appellate Courts for the 1971-1972 Term—Evidence*, 33 LA. L. REV. 306, 318 (1973), reprinted in G. PUGH, *supra* note 39, at 489.

147. 345 So. 2d 1185 (La. 1977).

> who made the record is genuinely unavailable for testimony, that he had no strong motive to misrepresent, and that in all probability the evidence is trustworthy.[148]

Further, speaking of the right of confrontation, the court stated:

> [I]t is generally accepted that any qualification of the right must be justified by necessity and attended by strong assurance that evidence admitted thereunder will be reliable.[149]

Because of the prosecution's failure in *Monroe* to show the genuine unavailability of the assistant coroner who had examined the victim of the alleged aggravated rape, the court held that it was improper for the trial court, over objection, to permit the coroner to testify from reports prepared in conjunction with such examination and to receive in evidence the reports themselves. The writers fully agree and enthusiastically applaud the very sound and salutary approach taken by the court. Under certain circumstances it is quite appropriate for the prosecution to be able to introduce trustworthy business records against the defendant in a criminal case, but defendant's constitutional right of confrontation must be given maximum feasible protection, and the rule laid down by the court strives to do just that.

The court in *Monroe* made clear that to the extent *State v. Graves*[150] and *State v. Corey*[151] contained conflicting expressions they were "expressly rejected."[152] The *Corey* case had been decided only a few months before *Monroe* and in the opinion of these writers had taken much too relaxed an approach to the admissibility of business records evidence offered by the prosecution. In *Corey* the court had held that documents purporting to be "telephone slips" indicating that defendant in a murder case had made certain very pertinent telephone calls were admissible in evidence as business records,[153] despite the failure of the state to adduce testimony by the persons making the slips or the custodians of the records. Nor was there any showing that the persons making the slips were unavailable, or that the records were trustworthy. Instead, as a foundation

148. *Id.* at 1190.
149. *Id.* at 1189.
150. 259 La. 526, 250 So. 2d 727 (1971).
151. 339 So. 2d 804 (La. 1976).
152. 345 So. 2d at 1190.
153. For statutory authority for a business records exception in Louisiana criminal cases, the court cited LA. R.S. 15:460 (1950). With deference, however, it is submitted that section 460 concerns the means of proving a document that is otherwise admissible, and does not provide that any document is admissible if proved in the manner specified.

the prosecution had adduced evidence from a police officer that he had obtained the telephone slips from designated motels. In a very persuasive dissent (a forerunner to the court's decision in *Monroe*) Justice Dixon argued that the foundation laid for the admissibility of the records was improper. In light of the position taken by the court in *Monroe*, the majority opinion in *Corey* seems to have lost its persuasive authority.

PROOF OF DOCUMENTS

Public Records—Cross-examination of Custodian

Properly certified copies of certain public records are to be admissible in evidence to the same extent as the original without the necessity of their custodian's testifying as to their authenticity.[154] Although the court recognized in *State v. Wientjes*[155] that the statute had not previously been applied in criminal cases, it holds that the statute may be appropriate under some circumstances in such cases. Referring to a provision in the hospital records act[156] authorizing an opposing party to call the maker of the record under cross-examination,[157] the court indicates that the same privilege is available with respect to the custodian of certified copies of public records offered by an opponent. This statement in *Wientjes*, salutary though it is, contrasts somewhat with earlier statements in another context that there is no authority in criminal cases for a defendant to call a witness under cross-examination.[158]

Contemporaneous Objection Rule—Applicability Where Testimony on Preliminary Examination Offered at Trial

In *State v. Ford*[159] the court, speaking through Justice Tate, took the position that since evidence offered at the preliminary examination may be relevant and admissible at such examination for a purpose different from that for which it might thereafter be offered at trial, failure to object to testimony at the preliminary examination does not preclude appropriate

154. LA. R.S. 13:3711-3712 (1950).

155. 341 So. 2d 390 (La. 1976).

156. LA. R.S. 13:3714 (Supp. 1967).

157. *See* State v. O'Brien, 255 La. 704, 232 So. 2d 484 (1970), discussed in *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Evidence*, 31 LA. L. REV. 388 (1971), reprinted in G. PUGH, *supra* note 39, at 409.

158. *See* State v. Clark, 325 So. 2d 802 (La. 1976), *and* State v. Rogers, 324 So. 2d 403 (La. 1975), discussed in *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 582 (1977).

159. 336 So. 2d 817 (La. 1976).

objection at trial. This position, we feel, is completely sound. If it were otherwise, preliminary examinations would be much more cumbersome and objection-ridden than they now are.

EVIDENTIARY CONSIDERATIONS AFFECTING APPEAL

Right to Transcript, the Contemporaneous Objection Rule, and Necessity of Stating the Grounds for the Objection

Article I, section 19 of the Louisiana Constitution of 1974 states that "[n]o person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based." The importance of the right to a complete transcript was underlined in *State v. Ford*.[160] A divided court there held that defendant was entitled to a new trial when, following his trial, new counsel had been appointed for him to handle his appeal and because of the absence of the court reporter at the trial a complete record thereof was not available for use by defense counsel on appeal.

State v. Fields[161] in dictum makes clear that article I, section 19 is to be interpreted literally: that for there to be a waiver of the right of appeal, defendant, not defense counsel, must have made the waiver. This does not mean, however, says the court, that a defense counsel is without power to waive other rights of his client. Other cases demonstrate that despite the recent legislative abandonment[162] of the old technical bill of exceptions procedure, careful defense counsel should be especially zealous to make known to the court the grounds for an objection,[163] and should take care to avoid any unintended suggestion that defense counsel acquiesces in an unfavorable ruling of the court.[164] Code of Criminal Procedure articles 841 *et seq*. were clearly designed to institute a simplified objection procedure and these writers urge that the articles not be given an unduly technical

160. 338 So. 2d 107 (La. 1976).

161. 342 So. 2d 624 (La. 1977).

162. LA. CODE CRIM. P. arts. 841-845, *as amended by* 1974 La. Acts, No. 297, § 1.

163. *See* State v. Nicolaus, 340 So. 2d 296 (La. 1976).

164. *Compare* State v. Williams, 341 So. 2d 370 (La. 1976) (which, in the opinion of these writers, takes an unduly strict view) *with* State v. Montoya, 340 So. 2d 557 (La. 1976) (wherein the court (appropriately, it is believed) protected defense rights on appeal despite the fact that in the heat of the trial and in deference to the trial court's statement, defense counsel had not articulated the grounds for the objection).

interpretation. Further, it is submitted that Louisiana should adopt a plain error rule similar to that in the Federal Rules of Evidence.[165]

COMPULSORY PROCESS

Violation of Sequestration Order

Where a witness has violated a sequestration order, what is the proper remedy? Should the witness be held in contempt? Should the party calling him be denied the opportunity to utilize his testimony?[166] If the witness in question is one called by the defendant, problems regarding a defendant's right of compulsory process are encountered.[167] The present position of the Louisiana Supreme Court is that the matter is one addressing itself to the sound discretion of the trial judge,[168] and despite vigorous protests by dissenting justices, the trial court's rulings have generally been upheld.[169]

A leading case is the 1973 decision in *State v. Barnard*.[170] In *Barnard*, a defense witness had inadvertently violated a sequestration order and in consequence, the trial court precluded her from testifying. A divided Louisiana Supreme Court affirmed the conviction. Thereafter, considering the matter on habeas corpus, the United States Court of Appeals for the Fifth Circuit took the position in *Barnard v. Henderson*[171] that the trial court action had been erroneous, that because of this issue (in

165. FED. R. EVID. 103(d). *See The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Evidence*, 37 LA. L. REV. 575, 611 (1977); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Evidence*, 36 LA. L. REV. 651, 677 (1976).

166. 6 J. WIGMORE, EVIDENCE § 1842 (J. Chadbourn rev. ed. 1976).

167. *See* Washington v. Texas, 388 U.S. 14 (1967); 14 A.L.R.2d 16 (1967).

168. *See* State v. Holmes, 305 So.2d 409 (La. 1974); State v. Barnard, 287 So. 2d 770 (La. 1973); State v. Coleman, 254 La. 264, 223 So. 2d 402 (1969).

169. For recent cases upholding trial court denial of defendant's efforts to secure the testimony of non-sequestered witness, *see* State v. Calloway, 343 So. 2d 694 (La. 1977); State v. McDaniel, 340 So. 2d 242 (La. 1976); State v. Baker, 338 So. 2d 1372 (La. 1976); State v. Bias, 337 So. 2d 426 (La. 1976).

For recent cases upholding the trial court's permitting a non-sequestered state's witness to testify, *see* State v. Mitchell, 344 So. 2d 1026 (La. 1977); State v. Johnson, 343 So. 2d 155 (La. 1977); State v. McCray, 337 So. 2d 1158 (La. 1976). Criticizing the "discretionary" rule, Justice Barham in dissent in *State v. Barnard*, after reviewing the cases, stated "it would seem that the discretionary rule is invoked to allow the State's witnesses to testify, while prohibiting the defendant's from exercising the same privilege." 287 So. 2d at 779.

170. 287 So. 2d 770 (La. 1973), discussed in *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Evidence*, 35 LA. L. REV. 525, 531 (1975), reprinted in G. PUGH, *supra* note 39, at 174 (Supp. 1976).

171. 514 F.2d 744 (5th Cir. 1975).

tandem with another) defendant was entitled either to be released or to be retried. The later *Barnard* case relied upon *Braswell v. Wainwright*,[172] another habeas corpus case, which had laid down the rule that absent the "knowledge, procurement, or consent" of defendant or his counsel, the violation of a sequestration order is not to preclude the defendant from adducing the testimony of a witness.[173]

Despite the seemingly fixed position of the federal courts in this area,[174] the Louisiana Supreme Court continues to cite *State v. Barnard* as representing the proper view.[175] The recent case of *State v. Baker*[176] is especially disturbing. The facts in *Baker* were very close to those in *Barnard*. Despite persuasive dissenting opinions relying on *Barnard v. Henderson* and the defendant's right of compulsory process, the Louisiana Supreme Court upheld the trial court's refusal to permit defendant to call a very significant witness. In addition to raising grave constitutional questions, such decisions as *Baker* seem out of harmony with the history and spirit of the legislation in the area. The 1928 Code of Criminal Procedure expressly provided that the issuance of a sequestration order "shall not deprive either party of the right of calling or examining as a witness one who shall not have obeyed the order of sequestration, when such party shall show that the witness remained in court or otherwise disobeyed the order without knowledge and without the connivance of the party calling him."[177] Applying this provision, a unanimous supreme court in *State v. Harris*[178] held that a trial judge was without authority to deny a defense

172. 463 F.2d 1148 (5th Cir. 1972).

173. The Fifth Circuit in both *Barnard* and *Braswell* cited the approach taken by the United States Supreme Court in *Holder v. United States*, 150 U.S. 91 (1893), wherein the Court states: "If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court." *Id.* at 92. To be contrasted with the *Holder* language is the discussion in 6 J. WIGMORE, EVIDENCE § 1842 (J. Chadbourn rev. ed. 1976).

174. *See* Barnard v. Henderson, 514 F.2d 744 (5th Cir. 1975); Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972); JONES ON EVIDENCE CIVIL AND CRIMINAL (6th ed. S. Gard ed. 1972); 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 615(01) (1977).

175. *See* State v. McDaniel, 340 So. 2d 242, 246 (La. 1976); State v. Bias, 337 So. 2d 426, 430 (La. 1976).

176. 338 So. 2d 1372 (La. 1976).

177. LA. CODE CRIM. P. art. 371 (1928).

178. 179 La. 405, 154 So. 39 (1934).

witness the opportunity to testify because of a violation of the trial judge's sequestration order where it was shown that the non-compliance was without the knowledge or connivance of defense counsel. Writing for the court, Chief Justice O'Niell stated:

> The purpose of this proviso, manifestly, is to prevent either party from being deprived of the testimony of a witness, by disobedience on the part of the witness, either through his ignorance or by inducement on the part of some one other than the party calling the witness. . . . The meaning of the discretion which is vested in the judge is that he may, for any reason that he deems sufficient, exempt any witness or class of witnesses from the effect of his order to leave the courtroom, and that he may permit to testify any witness who has violated the order, and that neither party shall have just cause to complain that any such witness was permitted to testify.[179]

The deletion of the provision from the 1966 Code of Criminal Procedure was seemingly to provide contempt of court as the only remedy for violation of a sequestration order, not to make denial of testimony a matter of trial court discretion,[180] regardless of the knowledge or connivance of counsel. In this connection the comment to the 1966 sequestration article states that "[u]nlike former R.S. 15:371, this article does not disqualify the witness for disobedience of the provisions of the article. However, after the court instructs the witness as provided by this article, a violation is a contempt."[181] The Louisiana Constitution stipulates that "[t]he power

179. *Id.* at 409-10, 154 So. at 40-41.

180. *See The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Criminal Procedure*, 31 LA. L. REV. 370, 376 (1971), reprinted in G. PUGH, *supra* note 39, at 651.

181. LA. CODE CRIM. P. art. 764, comment (b). That this was in fact the intention of the Louisiana State Law Institute is made perhaps even clearer by an earlier version of the same comment, the one approved at the September 1965 meeting of the Semantics Committee concerning the Code of Criminal Procedure:

> Article 5 has been adopted unanimously by the council and reads as follows:
> *Article 5. Exclusion and conduct of witnesses*
>
> Before or at any stage of a trial, the court may, and at the request of either the state or the defendant shall, order that the witnesses shall not be allowed to remain at any place where they may see or hear the proceedings. The court shall order the witnesses not to discuss with each other or any person the facts of the case or the testimony of any witness. The order shall not apply to communications between witnesses and the district attorney or defense counsel. The court may modify its order as justice may require.
>
> Source: New; cf. R.S. 15:371.
>
> *Comments*
>
> (a) The proposed text is a stylistic revision of R.S. 15:371 except that it

to punish for contempt of court shall be limited by law,"[182] and nowhere in the criminal procedure area is such denial of testimony explicitly authorized.[183]

LIMITING INSTRUCTIONS

Opening Statement by District Attorney

In recent years the law has become much more realistic, relying much less upon the efficacy of judicial instructions to disregard or limit the use of certain evidence or other information.[184] *State v. Green*,[185] it seems to these writers, runs counter to these currents of realism and is a very disturbing case. The state's contention in a negligent homicide case was that the victim's death in an automobile accident had been caused by defendant's driving while intoxicated. The district attorney's opening statement outlined in dramatic detail the devastating results of the defendant's blood test.[186] Because of what the trial court found to be noncompliance with the pertinent statute, however, the results of the blood

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omits that part of the latter which seems to require that the witnesses are placed in custody of the sheriff, when an order of sequestration is issued. This seems unnecessary.

(b) The proposed text rejects the concept of disqualification of the witness for disobedience of the provisions of the article as does R.S. 15:371. However, the sanction of contempt proceedings is available, but the Advisors thought that it was not necessary to state the fact specifically. Obviously after the court has instructed the witness as provided by Art. 5, a violation would be a contempt.

Without discussing the Official Comment, *State v. Rouse*, 256 La. 275, 236 So. 2d 211 (1970), held that exclusion of testimony is an available remedy.

182. LA. CONST. art. V, § 2.

183. Article 21(3) of the Code of Criminal Procedure provides that "contumacious failure to comply" shall constitute a direct contempt of court, and article 25 of the Code provides "except as otherwise provided in this article, a court may punish a person adjudged guilty of contempt of court in connection with a criminal proceeding by a fine of not more than five hundred dollars, or by imprisonment for not more than six months, or both."

184. *See* Bruton v. United States, 393 U.S. 123 (1968); Jackson v. Denno, 378 U.S. 368 (1964); Rideau v. Louisiana, 373 U.S. 723 (1963); State v. Rideau, 242 La. 431, 137 So. 2d 283 (1962), discussed in *The Work of the Louisiana Appellate Courts for the 1961-1962 Term—Evidence*, 23 LA. L. REV. 413 (1963), reprinted in G. PUGH, *supra* note 39, at 657.

185. 343 So. 2d 149 (La. 1977).

186. The district attorney stated that the analysis of defendant's blood " 'showed that this man had a blood alcohol content by weight of .30. Under the law of Louisiana a person with a blood alcohol content of .10 is presumed to be intoxicated. This man is three times past that presumption.' " 343 So. 2d at 151.

test were held inadmissible in evidence. The trial court denied defendant's motion for a mistrial but carefully instructed the jury that in arriving at their verdict they were to consider only the testimony of sworn witnesses, and that what the lawyers said and argued was not evidence. The supreme court affirmed, a majority concluding that clear and substantial prejudice had not been shown. Three justices dissented. No justice argued that the remarks had been made in bad faith by the prosecution. In the only dissent with written reasons, Justice Tate argued eloquently, however, that defendant was entitled to a new trial. He reasoned that Code of Criminal Procedure article 766 requires only that the district attorney shall explain "in general terms, the nature of the evidence by which the state expects to prove the charge" and that "[w]hen the prosecutor details evidence which subsequently is not admitted, he takes the risk that a mistrial may have to be granted."[187]

In the opinion of these writers, it is wholly unrealistic to believe that the jury in the *Green* case would actually have been able to follow the trial court's limiting instructions. The statement by the prosecutor was in positive language, asserting facts central to the case. The "reverberating clang" of the prosecution's statement that the test showed that the defendant was "three times past" the statutory presumption of intoxication would, it is submitted, have drowned out judicial instructions to limit or ignore.[188] Once such an accusatory note was struck, the bell could not thereafter be unrung.

EVIDENTIARY RULES APPLICABLE IN PRELIMINARY EXAMINATIONS

In an excellent opinion authored by Justice Dennis, the majority of the court in *State v. Jenkins*[189] makes clear that the preliminary examination provided for by Code of Criminal Procedure articles 291 *et seq*.[190] "is to be full blown and adversary, and one in which the defendant is entitled to confront witnesses against him and to have full cross-examination of them."[191] However, it appears from *Jenkins* that under very limited circumstances certain hearsay testimony that would not be admissible at the trial may be properly admissible at the preliminary examination.[192]

187. *Id*. at 154.

188. See the statement by Justice Cardozo in an analogous context in *Shepard v. United States*, 290 U.S. 96, 104 (1933).

189. 338 So. 2d 276 (La. 1976).

190. LA. CODE CRIM. P. arts. 291-298.

191. 338 So. 2d at 279. In support of the right of full cross-examination, see also the per curiam opinion in *State v. Antoine*, 344 So. 2d 666 (La. 1977).

192. *See The Work of the Louisiana Appellate Courts for the 1975-1976 Term—*

EVIDENTIARY RULES APPLICABLE IN DISBARMENT PROCEEDINGS

As amended in 1971, the Articles of Incorporation of the Louisiana State Bar Association provide that in disbarment proceedings following an attorney's conviction of what is determined to be a "serious crime," the certificate of conviction shall constitute "conclusive evidence of his guilt of the crime for which he has been convicted"[193] and that the sole issue at the disciplinary hearing shall be "whether the crime warrants discipline, and if so, the extent thereof."[194] Further, "[a]t the hearing the respondent may offer evidence only of mitigating circumstances not inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime."[195] To what extent may the defendant at the disciplinary hearing go into the circumstances of the crime in order to show the extent of his involvement—for example, that albeit guilty of a criminal conspiracy, he played only a minor role therein? The matter was the subject of consideration by the court during the past term.[196] In *State v. Loridans*[197] the court held that defendant could not introduce evidence for the purpose of showing that he lacked the knowledge or intent required by the criminal statute, but that this did not preclude "an inquiry into the facts surrounding the commission of the offense insofar as they reflect upon the character or quality of the criminal conduct or a respondent's degree of complicity therein."[198] It is not always easy to ascertain whether particular evidence offered by the defendant is admissible as bearing on the degree of his complicity in the crime, or is inadmissible because it is "inconsistent with the essential

Evidence, 37 LA. L. REV. 575, 600 (1977); *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Pre-Trial Criminal Procedure*, 37 LA. L. REV. 535, 551 (1977); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Louisiana Constitutional Law*, 36 LA. L. REV. 533, 544 (1976); Note, 36 LA. L. REV. 1050 (1976).

Compare in this connection the language in the later per curiam opinion of the court in *State v. Antoine*, 344 So. 2d 666 (La. 1977), which may indicate a broader approach to the admissibility of hearsay evidence at the preliminary examination.

193. ARTICLES OF INCORPORATION, LOUISIANA STATE BAR ASS'N, LA. R.S. 37, ch. 4, art. XV, § 8, ¶ 7(c).

194. *Id.* art. XV, § 8, ¶ 7(d).

195. *Id.*

196. Louisiana State Bar Ass'n v. Hamilton, 343 So. 2d 985 (La. 1977); Louisiana State Bar Ass'n v. Ponder, 340 So. 2d 134 (La. 1976); Louisiana State Bar Ass'n v. Shaheen, 338 So. 2d 1347 (La. 1976); Louisiana State Bar Ass'n v. Loridans, 338 So. 2d 1338 (La. 1976).

197. 338 So. 2d 1338 (La. 1976).

198. *Id.* at 1345.

elements of the crime.''[199] It seems to these writers that the proper test of admissibility is similar to that used in a sentence determination in an ordinary criminal case.[200]

199. *See* dissents by Justice Dennis in *Louisiana State Bar Ass'n v. Shaheen*, 338 So. 2d 1347, 1354 (La. 1976); *Louisiana State Bar Ass'n v. Loridans*, 338 So. 2d 1338, 1347 (La. 1976).

200. See sentence guidelines embodied in Louisiana Code of Criminal Procedure article 894.1 enacted by Act 635 of 1977 providing, inter alia, that the court shall accord weight to whether there were "substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense." LA. CODE CRIM. P. art. 894.1(4).